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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1903

No. 62

JACOB SENKO, PETITIONER,

vs.

LACROSSE DREDGING CORPORATION

ON WRIT OF CERTIORARI TO THE APPELLATE COURT OF THE STATE
OF ILLINOIS, FOURTH DISTRICT

PETITION FOR CERTIORARI FILED APRIL 12, 1904

(CERTIORARI GRANTED MAY 24, 1904)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

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OF ILLINOIS, FOURTH DISTRICT

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IN THE CITY COURT OF GRANITE CITY, ILLINOIS

Law No. 6563

JACOB SENKO, Plaintiff

vs.

LA CROSSE DREDGING COMPANY, Defendant

AMENDED COMPLAINT—Filed August 19, 1953

Count I

Comes now the plaintiff, Jacob Senko, by his attorney George J. Moran, and leave of Court having been first had and obtained, files this his amended complaint against the defendant, and alleges:

1. That this action is based upon the provisions of the Merchant Marine Act as amended, June 5th, 1920, commonly known as the Jones Act. 46 USCA, Section 688.

2. That on to-wit the 5th day of November, 1951, the defendant was the owner and operator of a certain dredge named "James Wilkinson", said dredge being operated on navigable waters of the United States in Madison County, Illinois.

3. That at all times herein mention-, the plaintiff, Jacob Senko, was in the employ of defendant as a deckhand and member of the crew of said dredge.

[fol. 10] 4. That said dredge was being operated on a certain canal known as the Chain of Rocks Canal, a short distance south of Lock No. 27; that on the shore of said canal there was a certain shed containing a coal stove, which shed and coal stove were in the exclusive possession and control of said defendant and were maintained and used by said defendant in furtherance of its dredging operation.

5. That on the aforesaid date, plaintiff, Jacob Senko, while acting in the furtherance of his employment on said

dredge, left the dredge and went ashore and into the aforesaid shed.

6. That while plaintiff was in said shed and acting within the scope of his employment, the defendant, by and through its agents, servants, and employees, carelessly and negligently managed, controlled and operated the aforesaid stove as to cause an explosion.

7. That as a direct and proximate result of the aforesaid explosion and negligence of the defendant, plaintiff was severely and permanently injured in that he sustained fractures and dislocations, that he has in the past and will in the future suffer great pain from the injuries inflicted as aforesaid; that he has in the past and will in the future expend and become liable for large sums of monies attempting to cure and heal his injuries inflicted as aforesaid; that he has in the past and will in the future lose large sums of monies which he otherwise would have earned but for the injuries inflicted as aforesaid.

Wherefore, plaintiff prays judgment against defendant in the sum of Seventy-five Thousand Dollars (\$75,000).

Jacob Senko, By George J. Moran, His attorney.

[fol. 11]

Count II

Comes now the plaintiff, Jacob Senko, by his attorney, George J. Moran, and leave of Court having been first had and obtained, files this his amended complaint against the defendant, and alleges:

1. Plaintiff repeats and realleges each and every allegation of paragraph one of Count I as and for paragraph one of Count II.

2. Plaintiff repeats and realleges each and every allegation of paragraph two of Count I as and for paragraph two of Count II.

3. Plaintiff repeats and realleges each and every allegation of paragraph three of Count I as and for paragraph three of Count II.

4. Plaintiff repeats and realleges each and every allegation of paragraph four of Count I as and for paragraph four of Count II.

5. Plaintiff repeats and realleges each and every allega-

tion of paragraph five of Count I as and for paragraph five of Count II.

6. That while plaintiff was in said shed and acting within the scope of his employment, the defendant by and through one of its agents, servants or employees, negligently and carelessly threw the contents of a bucket containing coal and fuel oil on to the aforesaid stove when it knew or should have known that such action might result in an explosion.

7. Plaintiff repeats and realleges each and every allegation of paragraph seven of Count I as and for paragraph [fol. 12] seven of Count II.

Wherefore, plaintiff prays judgment against the defendant in the sum of Seventy-five Thousand Dollars (\$75,000).

Jacob Senko, By: George J. Moran, His attorney.

Count III

Comes now the plaintiff, Jacob Senko, by his attorney George J. Moran, and leave of Court having been first had and obtained, files this his amended complaint against the defendant, and alleges:

1. Plaintiff repeats and realleges each and every allegation of paragraph one of Count I as and for Paragraph one of Count III.

2. Plaintiff repeats and realleges each and every allegation of paragraph two of Count I as and for paragraph two of Count III.

3. Plaintiff repeats and realleges each and every allegation of paragraph three of Count I as and for paragraph three of Count III.

4. Plaintiff repeats and realleges each and every allegation of paragraph four of Count I as and for paragraph four of Count III.

5. Plaintiff repeats and realleges each and every allegation of paragraph five of Count I as and for paragraph five of Count III.

[fol. 13] 6. That then and there it became and was the duty of the defendant to furnish a safe place to work and so maintain the said shed and the contents thereof in a safe

condition so that plaintiff while in his employment with said defendant, might safely perform his duties.

7. That notwithstanding the aforesaid duty, defendant did not so maintain and keep said shed and the contents in a safe condition, but on the contrary, on the day and date aforesaid, did one or more of the following negligent acts:

a. in furnishing and maintaining a stove in said shed which was not reasonably safe for the purpose intended, and that it maintained and operated a stove in said shed without inspecting said stove for long periods of time.

b. That it knowingly permitted its agents and servants to conduct a practice of throwing a combination of fuel oil and coal in said stove for the purpose of heating said shed.

c. That it maintained the coal pile used for fueling the stove in said shack, in such a manner that it was necessary to add fuel oil to said coal to make it burn in said stove.

8. Plaintiff repeats and realleges each and every allegation of paragraph seven of Count I, as and for paragraph eight of Count III.

Wherefore, plaintiff prays judgment against defendant in the sum of Seventy-five Thousand Dollars (\$75,000).

Jacob Senko, By: George J. Moran, His Attorney.

[fol. 14]

Count IV

Comes now the plaintiff, Jacob Senko, by his attorney, George J. Moran, and leave of Court having been first had and obtained, files this his amended complaint against the defendant, and alleges.

1. Plaintiff repeats and realleges each and every allegation of paragraph two of Count I as and for paragraph one of Count IV.

2. Plaintiff repeats and realleges each and every allegation of paragraph three of Count I as and for paragraph two of Count IV.

3. Plaintiff repeats and realleges each and every allega-

tion of Paragraph four of Count I as and for paragraph three of Count IV.

4. Plaintiff repeats and realleges each and every allegation of paragraph Five of Count I, as and for paragraph four of Count IV.

5. That while plaintiff was in said shed and acting within the scope of his employment, he was severely and permanently injured in that he sustained fractures and dislocations; that he has in the past and will in the future suffer great pain from his injuries inflicted aforesaid; that he has in the past and will in the future expend and become liable for large sums of monies attempting to cure and heal his injuries inflicted as aforesaid; that he has in the past and will in the future lose large sums of monies which he otherwise would have earned but for the injuries inflicted as aforesaid.

[fols. 15-18] Wherefore, plaintiff prays judgment against defendant for maintenance and cure in the sum of Six Thousand Dollars (\$6,000).

Jacob Senko, By George J. Moran, His Attorney.

[fol. 19]

[File endorsement omitted]

IN THE CITY COURT OF GRANITE CITY, ILLINOIS

[Title omitted]

ANSWER OF DEFENDANT—Filed October 12, 1953

Count I

LaCrosse Dredging Company by Pope and Driemeyer, its Attorneys, answering Count I of plaintiff's complaint filed herein states:

1. It denies each and every allegation contained in paragraph 1 of Count I of plaintiff's amended complaint and avers that section 33 of the Merchant Marine Act of 1920 (46 U.S.C.A. § 688), commonly known as the Jones Act, does not apply to this action for the reason that plaintiff was not a seaman and member of the crew of a vessel operating

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on navigable waters of the United States at the time of his alleged injury.

2. It denies each and every allegation contained in paragraph 2 of Count I of Plaintiff's amended complaint.

3. It denies each and every allegation contained in paragraph 3 of Count I of plaintiff's amended complaint.

4. It denies each and every allegation contained in paragraph 4 of Count I of plaintiff's amended complaint.

[fol. 20] 5. It denies each and every allegation contained in paragraph 5 of Count I of plaintiff's amended complaint.

6. It denies each and every allegation contained in paragraph 6 of Count I of plaintiff's amended complaint.

7. It denies each and every allegation contained in paragraph 7 of Count I of plaintiff's amended complaint.

Count II

Defendant, LaCrosse Dredging Company, by Pope and Driemeyer, its attorneys, answering Count II of plaintiff's amended complaint, states:

1-5. It repeats and realleges each and every allegation of its answer to paragraphs 1, 2, 3, 4, and 5 of Count I of plaintiff's amended complaint as and for its answer to paragraphs 1, 2, 3, 4, and 5 of Count II of plaintiff's amended complaint.

6. It denies each and every allegation contained in paragraph 6 of Count II of plaintiff's amended complaint.

7. It denied each and every allegation contained in paragraph 7 of Count II of plaintiff's amended complaint.

Count III

Defendant, LaCrosse Dredging Company, by Pope and Driemeyer, its attorney, answering Count III of plaintiff's amended complaint States:

1-5. It repeats and realleges each and every allegation of its answer to paragraphs 1, 2, 3, 4, and 5 of Count I of plaintiff's amended complaint as and for its answer to paragraphs 1, 2, 3, 4, and 5 of Count III of plaintiff's amended complaint.

6. It denies each and every allegation of Paragraph 6 of Count III of plaintiff's amended complaint.

7. It denies each and every allegation of paragraph 7 of Count III of plaintiff's amended complaint.

8. It denies each and every allegation of paragraph 8 of Count III of plaintiff's amended complaint.

Pope and Driemeyer, Attorneys for Defendant.

Pope and Driemeyer, 322 First National Bank Building,
East St. Louis, Illinois.

[fol. 22] [File endorsement omitted]

IN THE CITY COURT OF GRANITE CITY, ILLINOIS

[Title omitted]

AMENDMENT TO AMENDED COMPLAINT—Filed November 3,
1953

Comes now the plaintiff, Jacob Senko, by his attorney, George J. Moran, and leave of Court being first duly obtained, files this amendment to his Amended Complaint.

Count V

Comes now the plaintiff, Jacob Senko, by his attorney, George J. Moran and for an alternative cause of action against the defendant, LaCrosse Dredging Company, alleges:

1. That on or about the 5th day of November, 1951, the plaintiff, Jacob Senko, was rightfully on the premises of the Chain of Rocks Canal and in a certain shed which shed was [fols. 23-26] owned by and in the exclusive control of the defendant, LaCrosse Dredging Company.

2. That in said shed, defendant maintained a certain coal stove which stove was in the exclusive possession and control of said defendant.

3. That while the plaintiff was rightfully in said shed, the defendant, by and through its agents, servants and employees, negligently and carelessly managed, controlled, and operated the aforesaid stove so as to cause it to explode.

4. That as direct and proximate result of the aforesaid explosion and negligence of the defendant, plaintiff was

severely and permanently injured in that he sustained fractures and dislocations; that he has in the past and will in the future suffer great pain from the injuries inflicted as aforesaid, that he has in the past and will in the future expend and become liable for large sums of monies attempting to cure and heal his injuries inflicted as aforesaid; that he has in the past and will in the future lose large sums of monies which he otherwise would have earned but for the injuries inflicted as aforesaid.

Wherefore plaintiff prays judgment against the defendant in the sum of Seventy-five Thousand Dollars (\$75,000.00).

Jacob Senko.

[fol. 27] [File endorsement omitted]

IN THE CITY COURT OF GRANITE CITY, ILLINOIS

[Title omitted]

ANSWER OF DEFENDANT TO AMENDMENT TO AMENDED COMPLAINT AND SUPPLEMENTAL ANSWER TO COUNTS I, II, AND III OF AMENDED COMPLAINT.—Filed January 26, 1954

LaCrosse Dredging Corporation, by Pope and Driemeyer, its attorneys, answering plaintiff's amendment to his amended complaint and Count V thereof, says:

1. It denies the allegations contained in paragraph 1.
2. It admits that the shed referred to in paragraph 2 contained a stove, and denies each of the other allegations contained in paragraph 2.
3. It denies the allegations contained in Paragraph 3.
4. It denies the allegations contained in paragraph 4, and denies that Count V, or any paragraph thereof is sufficient in law to require defendant to respond to plaintiff in any amount of damages, and denies that it is sufficient to state a cause of action against defendant.

Further answering plaintiff's amended complaint defendant says that plaintiff should not be permitted to maintain [fol. 28] this action against it because plaintiff, on or about

August 2, 1952, filed his application for adjustment of claim with the Industrial Commission of Illinois for compensation for disability resulting from the same injuries for which damages are sought in this action; that said application for adjustment of claim was assigned No. 481 804 by the Industrial Commission of Illinois and after notice to defendant of the filing of said application, it came up for hearing before an arbitrator designated by the Industrial Commission of Illinois on February 4, 1953, at East St. Louis, Illinois; that at said hearing plaintiff was present and represented by counsel, and defendant was likewise represented by counsel and plaintiff and defendant stipulated and agreed that on November 5, 1951 they were operating under the provisions of the Workmen's Compensation Act of Illinois, and that the relationship of employee and employer existed between plaintiff and defendant on that date and that on that date plaintiff did sustain accidental injuries which did arise out of and in the course of his employment by defendant, which injuries are the same injuries for which plaintiff seeks recovery in the case at bar, and that by reason of said stipulation, which has never been modified, amended or set aside, plaintiff is precluded, as a matter of law, from maintaining his action against defendant herein.

Pope and Driemeyer, Attorneys for Defendant.

Pope and Driemeyer, 322 First National Bank Building, East St. Louis, Illinois.

[fol. 29]

[File endorsement omitted]

IN THE CITY COURT OF GRANITE CITY, ILLINOIS

[Title omitted]

REPLY—Filed May 5, 1954

Comes now the plaintiff, Jacob Senko, by his attorney, George J. Moran, and in reply to the affirmative matter set forth in defendant's Answer to the Amendment to Amended Complaint, says:

1. Plaintiff admits that an Application for Adjustment of Claim with the Industrial Commission of Illinois was

filed on or about the 2nd day of August, 1952, but denies that this application was filed by either himself or his attorney.

2. Plaintiff further avers that if a Stipulation were entered into between the parties hereto to the effect that they were operating under the provisions of the Workmen's Compensation Act of Illinois, that said Stipulation would not preclude the plaintiff as a matter of law from maintaining his action against the defendant herein.

[fol. 30] Jacob Senko, Plaintiff, By: George J. Moran, His Attorney.

Duly sworn to by George J. Moran jurat. Omitted in printing.

[fol. 31] [File endorsement omitted]

IN THE CITY COURT OF GRANITE CITY, ILLINOIS

[Title omitted]

MOTION FOR JUDGMENT ON PLEADINGS—Filed May 10, 1954

LaCrosse Dredging Company, defendant, by Pope and Driemeyer, its attorneys, moves for judgment in its favor in bar of plaintiff's action under Counts I, II and III of plaintiff's amended complaint and plaintiff's amendment to his amended Complaint and Count V thereof and, as to each of them, and as grounds for said motion shows to the Court:

1. It appears affirmatively from the verified answer of defendant to the Amendment to the Amended Complaint and Defendant's Supplemental Answer to Counts I, II and III of the Amended Complaint, filed herein on January 26, 1954, and Plaintiff's Reply thereto, a copy of which was served on defendant on May 5, 1954, that:

[fol. 32] (a) An Application for Adjustment of Claim was filed, in plaintiff's name and in his behalf, with the Industrial Commission of Illinois on or about August 2, 1952, for compensation for disability resulting from the same injuries for which damages are sought in this action;

(b) The said Application for Adjustment of Claim was assigned No. 481,804 by the Industrial Commission of Illinois and, after notice to defendant of its filing, came on for hearing before and Arbitrator designated by the Industrial Commission of Illinois on February 4, 1953, at East St. Louis, Illinois;

(c) At said hearing held before said Arbitrator at East St. Louis, Illinois, and on such date, plaintiff was present and represented by counsel and defendant was likewise represented by counsel:

(d) Plaintiff and defendant then and there stipulated and agreed that on November 5, 1951 (the date plaintiff alleges in this suit he received his injuries herein complained of), plaintiff and defendant were operating under the provisions of the Workmen's Compensation Act of Illinois and the relationship of employee and employer existed between plaintiff and defendant on November 5, 1951, and on that date plaintiff did sustain accidental injuries which did arise out of and in the course of his employment by defendant:

(e) The injuries referred to in the aforesaid stipulation are the same injuries for which plaintiff seeks recovery in the case at bar; and

[fols. 33-33a] (f) The aforesaid stipulation has never been modified, amended or set aside.

By reason of the foregoing, and as a matter of law, plaintiff is precluded from maintaining his action herein against defendant.

La Crosse Dredging Company, By Pope and Driemeyer, Its Attorneys.

Pope and Driemeyer, 322 First National Bank Building, East St. Louis, Illinois.

[fols. 34-72] IN THE CITY COURT OF GRANITE CITY, ILLINOIS

[Title omitted]

RECORD OF PROCEEDINGS AT TRIAL

Be it remembered that at the trial of the above-entitled cause, on May 10, 1954, before Honorable Judge Wesley

Lunders, Judge of said court, and a jury, the following evidence was heard and proceedings had:

APPEARANCES

Mr. George Moran, Mr. Wm. Beatty, Appearing for Plaintiff.

Pope & Driemeyer, (by) Mr. Rbt. Broderick, Appearing for defendant.

.

[fol. 73] WILLIAM SANDERS, having first been duly sworn, testified on behalf of Plaintiff as follows:

Direct Examination.

By Mr. Moran:

Q. Will you tell the Court and jury your name.

A. William E. Sanders.

Q. And where do you live, Mr. Sanders?

A. 829 Logan, Alton, Illinois.

Q. Alton, Illinois.

A. Yes sir.

Q. And that's in Madison County here, isn't it?

A. Yes sir.

Q. Now, what is your business or occupation?

A. I'm a hydraulic dredge operator, hoisting engineer in other words.

Q. You're a hydraulic operator out of the hoisting engineers local, is that correct?

A. Right.

Q. Now, the work that you do, Mr. Sanders, is it on the water or land?

A. On the water.

Q. And where have you done—how long have you been working on the water?

[fol. 74] A. Fifteen years old.

Q. Since you were fifteen.

A. Yes sir.

Q. I guess I can ask you your age; how old are you?

A. Forty-three.

Q. So that would be 28 years.

A. Yes.

Q. Now, when you first started working you say you started working on the water when you were fifteen.

A. Right.

Q. Where was that?

A. Alton, Illinois.

Q. What did you do?

A. Work for a guy run a ferry boat,

Q. And from that time on have you—where have you been working?

A. I work off on dredges, boats.

Q. Now, are you in any kind of business now, Mr. Sanders?

A. I have part of a little business in Alton.

Q. What kind of business?

A. Sand business.

Q. When you say sand business, where do you get your sand?

A. Out of the river, commercial sand.

Q. How do you get it out of the river?

A. Dredge it out.

Q. You have a dredge boat?

A. Yes.

Q. Now, Mr. Sanders, were you in the service?

A. Yes sir.

[fol. 75] Q. What branch?

A. In the CB's.

Q. How long were you in there?

A. In there two years.

Q. Mr. Sanders, have you ever travelled the river from, say, St. Louis to Alton?

A. Yes.

Q. And when was the first time you ever travelled the river, if you remember?

A. When I was a kid we run all up and down the river.

Q. Were you working at that time?

A. Yes, I was working.

Q. Are you acquainted with the place called Gabaret Shoot?

A. Yes.

Q. And to your knowledge how long has Gabaret Shoot been known as Gabaret Shoot?

A. Well, I couldn't tell you that; I know it's Garbarett Shoot and Mosentine Island but how long I don't know.

Q. Mr. Sanders, have you ever had occasion to travel on Gabaret Shoot sometime in the past?

A. Well, I remember when we were kids we went up through there, short cut, in a boat.

Q. What kind of boat?

A. Small boat.

Q. Did you ever see any rafts or barges that came up through there at any time?

A. No rafts or nothing; used to take logs down the river but come up empty.

[fol. 76] Q. You would take logs down the river and when you came back up the river you would come back up through Gabaret Shoot.

A. Sometimes we did. One time we hit a cable in there, ferry, and didn't go up there any more.

Q. But you had taken stuff up there before?

A. Yes.

Q. Now, on the 5th day of November 1951, were you employed, were you working on the 5th day of November 1951?

A. Yes.

Q. For whom were you employed?

A. LaCrosse Dredging Company.

Q. And where were you working?

A. I was operating a dredge, Wilkinson.

Q. That's W-i-l-k-i-n-s-o-n. And when you say you were operating a dredge, where were you operating it at?

A. I was operating in the canal.

Q. In the Chain of Rocks canal down here?

A. Yes sir.

Q. And how long had you been, prior to November 5, 1951 to your knowledge, had you been operating that dredge down there?

A. Well, we went in there—started up so many times, I really don't know. We broke down several times in there.

Q. I mean how long had you been working for the James Wilkinson and attached—

Mr. Broderick: I object to that; he hasn't said he was attached.

Mr. Moran: I'll withdraw—

Judge Lueders: Sustained.

Mr. Moran: Did you work on the James Wilkinson?

[fol. 77] A. I operated the James Wilkinson, but I couldn't—I imagine might have been in there four or five months.

Q. Were you working at any time on November 5th—you know where Lock 27 is?

A. Yes, sir.

Q. When we talk about directitons in the canal, down toward Venice would be south, is that correct?

A. That's right.

Q. And up to Woodriver or Hartford would be north, generally, is that right?

A. Right.

Q. Were you working south or north of the Lock 27 in the canal on the 5th day of November?

A. South.

Q. The south, and do you know about how deep the water was where you were operating, approximately?

A. Well, we were trying to get water 16 feet below standard low, I believe.

Q. About how wide was the stream there at that time, Mr. Sanders?

A. I'd say about 200 feet.

Q. Now, do you know Jake Senko?

A. I knew him working on a dredge, yes.

Q. When you were on the dredge, what was he?

A. A deckhand on the dredge.

Q. As a deckhand on the dredge did he have to wear anything for his protection?

Mr. Broderick: Now I don't believe the characterization of what the plaintiff was is proper. He could tell what he [fol. 78] did, but I don't believe the characterization of him as a deckhand would be proper for this witness to state.

Mr. Moran: Your Honor, I believe that's just like calling a man a lawyer when he's a lawyer or doctor when he's a

doctor. That's what the job was and I believe the witness will testify.

Judge Lueders: Well, there is a question in this case as to exactly—

Mr. Moran: This was what he was termed as and known as.

Mr. Broderick: I object to the argument. He wasn't so termed; he was carried as a laborer and so designated.

Judge Lueders: I'll sustain the objection. Let him tell what Senko did, what his duties were, if he knows; or what he did if he doesn't know what his duties were.

Mr. Moran: Well, I presume I mean from that he can call him a laborer when I can't call him a deckhand; that's what we're getting into:

Judge Lueders: Well, the question is what did the man do?

Mr. Moran: But also the terminology aboard a vessel is very important in determining whether or not they're a complement, and so forth. I'll continue. What were Senko's duties aboard this dredge?

A. Well, he kept the outside of the dredge cleaned up and done whatever work there was around there.

Q. In doing that did he have any orders about wearing any kind of equipment or not?

Mr. Broderick: I object to that unless the witness gave him such orders or knows of his personal knowledge.

Judge Lueders: Yes, sustained.

[fol. 79] Mr. Moran: Was there a company order? Was there a rule that you are to wear life jackets?

Mr. Broderick: Wait a minute! I think if there's a rule the rule would be the best evidence. Well, I'll withdraw the objection; go ahead.

Mr. Moran: Now, state when he left the dredge and went ashore, how would he get there?

A. Well, if the tug didn't take him ashore he went ashore in a row boat.

Q. When he went in the row boat did he wear a life jacket?

A. He wore a life jacket.

Q. Now, where were his duties, Mr. Sanders? Were they confined to the vessel or ashore?

A. Well, the deckhand or laborer or whatever he is, he done the work around there and anything done on the shore he went and did it.

Q. If he had anything to do on the shore; was that the work attached to the vessel or not?

A. Well, he run errands back and forth, that's what he did.

Q. For the ship or for the vessel?

A. That's right.

Mr. Broderick: Wait a minute! I think that's leading and he doesn't say it's for the vessel.

Judge Lueders: Sustained.

Mr. Moran: When he went ashore what did he go ashore for?

A. Jake would take the lanterns to the shore, go to the shore and get supplies. If they wanted something on the [fol. 80] bank, some shovels or sledge hammers or bars, whatever they needed, that's what Jake would do.

Q. Now, how many people were aboard this vessel?

A. Well, there was an operator, an engineer—

Q. What is an operator?

A. Operator, he operates the dredge; he's called the lever man.

Q. The lever man, and what others were there?

A. The engineer, he takes care of the engines in the engine room.

Q. And the next one.

A. He's the oiler.

Q. What does the oiler do?

A. Oils all the machinery.

Q. And the other one?

A. The other was the deckhand.

Q. What did the deckhand do?

Mr. Broderick: I object to the characterization of the man.

Mr. Moran: We can call a man an oiler or an operator but we can't call him a deckhand; I don't understand that. I would like to be heard on it.

Mr. Broderick: All right, let's be heard on it. I don't care what you call him but if you're endeavoring—

Mr. Moran: Let's make it outside.

Judge Lueders: I don't think we have to have any problem here. Isn't that one of the questions as to whether this man was a deckhand?

(Discussion off the record.)

Mr. Moran: I didn't get the last question that I asked.
[fol. 81] Q. (read) What did the deckhand do?

Mr. Moran: The objection was sustained I presume.

Judge Lueders: Yes.

Mr. Moran: Now, the type of work that Senko did aboard this dredge vessel, what was that called? Did you have a name for it?

A. Well, I said he was a deckhand on the boat, that's all I know. You call him a laborer or deckhand.

Mr. Broderick: I make the same objection, if Your Honor please. He's asking the question again after the objection has been sustained and I think it's improper for the reasons assigned and ask that it be stricken and the jury instructed to disregard it.

Judge Lueders: All right, sustained and the jury will disregard the answer at this time. Now let him tell what the duties of this job were, of Senko.

Mr. Moran: What were Senko's duties?

A. Well, Senko like I said cleaned up the dredge. If they needed anything on the bank that was his job to take it to him, sledge hammers and bars and shovels that was left on the job. His job was to take care of the deck, clean the decks up is a deckhand's job; if there's any ropes to be spliced that's his job, keeping everything in shape.

Q. Now, you were in the Navy, were you not?

Mr. Broderick: Wait a minute! Insofar as the characterization is concerned I move it isn't proper and ask that portion of the answer be stricken.

Judge Lueders: All right, that portion of the answer will be stricken.

[fol. 82] Mr. Moran: Now, you have been on the river since you were fifteen did you say?

A. Yes.

Q. And since you were fifteen has there been a characterization of the duties that Senko has been doing, as to what job that was?

Mr. Broderick: I object to that.

Judge Lueders: Overruled, he may answer.

A. I don't quite get the question.

Mr. Moran: I said, you have been on the river working on boats since you were fifteen years of age.

A. That's right, I have.

Q. And since you were fifteen years of age and working on those boats, has there been a characterization—and you were in the Navy, weren't you?

A. Yes sir.

Q. Now, the type of work that from your experience in the Navy and from your experience in operating boats and being on boats, is there a characterization from the standpoint of your duties as a riverman, is there a characterization of that particular job that Senko was doing?

Mr. Broderick: Wait a minute! I don't believe, if Your Honor please, this man's experience in the Navy and as a riverman and what other type of experience he had in plying waters would have anything to do with the characterization of work done on this earth-moving equipment we are talking about as a dredge.

Judge Lueders: Well, I think the objection is well taken. I'll sustain the objection. I think the question would be proper if limited to this type of operation.

Mr. Moran: Now, Mr. Sanders, from your experience [fol. 83] working on the river since you were fifteen and working—how long have you been working on and off dredges?

A. I went to work on a dredge when I was eighteen years old.

Q. From your working on the dredges since you were eighteen years old, is there a characterization of a job of the

type that Senko was doing? Just answer, is there a characterization for that job?

A. There is.

Q. What is that characterization?

Mr. Broderick: The characterization by whom and where? I don't believe this is a proper method of getting to this problem, if Your Honor please, to have this witness state about a characterization.

Judge Lueders: Well, I believe if you should add to the question among the operators.

Mr. Moran: Is there a characterization of that job for people who work in and around dredges? Is that job known as a particular job?

A. Well, that particular job they're all the same on every boat, everywhere you go.

Q. What are they called?

A. A deckhand.

Mr. Broderick: I object to that.

Judge Lueders: Overruled, he may answer; the answer may stand.

Mr. Moran: Now, Mr. Sanders, when you say you operated the dredge, what did you do aboard that dredge?

[fol. 84] A. I operated the machinery that pulls the sand out of the river.

Q. And what kind of machinery pulls the sand out of the water?

A. Well, the dredge has a 900 horsepower motor pulling an 18 inch pump.

Q. And is there some kind of a mechanical device or something that goes down into the bed of the stream to pull the sand out?

A. The pipe goes in the bottom of the river.

Q. Do they call that a cutter?

A. This was a cutter type dredge.

Q. What is that cutter?

A. This cutier cuts the material loose that's hard.

Q. How does the material come into the pipes?

A. This pipe, this suction from this pump pulls this sand and water through this pipe.

Q. And where does the sand and water come right after it comes through the pipe?

A. Goes through the discharge pipe.

Q. Where does the discharge pipe go?

A. Through the pipe out to the shore.

Q. And what is this pipe called?

A. They call it—a pipe across the river called a pontoon line.

Q. This pipe, does it rest on anything going to shore?

A. Resting on tanks on the water.

Q. Does anybody operate or work on those pontoons or tanks or what?

[fol. 85] A. Tanks or pontoons.

Q. Does anybody work on those pontoons?

Mr. Broderick: I assume this is directed to the operation we are concerned with here on the 5th of November 1951, is it?

Mr. Moran: I'm describing an operation on November 5, 1951. Were some people working on it?

A. On that particular night there wasn't.

Q. Prior to that time had they been working there?

A. When we set it up we had to break it for quite a while.

Q. These people that worked on pontoons, do they wear life jackets?

A. Yes.

Q. Now, how does the dredge in general—any engines aboard the dredge?

A. Engines aboard that dredge? Yes, there's an engine that pulls the pump and another engine pulls the generators.

Q. You have some anchors aboard there that work the dredge.

A. The anchors are put on the shore or in the water.

Q. What operates the anchors?

A. The hoists.

Q. Was there an engine or motor that operates the anchors?

A. Yes.

Q. Do you have anything to keep the dredge in place outside of the anchors?

A. Have spuds.

Q. Now, were the anchors run—were they fore or aft?

A. They're out to the side.

Q. I see, now, would they be on the port or starboard side?

A. One on the port and one on the starboard.

[fol. 86] Q. When you say starboard you mean on the right side.

A. On the right.

Q. And port would be on the left.

A. Yes.

Q. Now then, sir, when you want to move this vessel how do you do it? How do you move the dredge?

A. It's a hard thing to explain; these cables—

Q. Let's withdraw the question. Do you have some spuds there?

A. Yes.

Q. How many spuds are aboard?

A. Two spuds.

Q. And about how big are they?

A. I think they may be 55 foot.

Mr. Broderick: I assume that George's questions are directed to the Wilkinson and the way it was being operated out there.

Mr. Moran: Yes.

Mr. Broderick: And in November of 1951.

Mr. Moran: Well, in November of 1951 did you have a couple of spuds on this Wilkinson?

A. Yes.

Q. They hadn't been moved in a day or two.

A. The dredge is moving all the time as you work.

Q. I see. What moves the dredge?

A. These cables you move, like I tried to explain. The anchors are out on the shore, see; you've got a spud down, this one is down and one is up. You swing this one anchor over as you go. Say I go to my left there; I drop this other spud if I want to step ahead, and raise this one, and move it like; works like a pair of stilts, that's the way it works.

[fol. 87] Q. On November 5—all this moving we're talking

about; where does the power come from that makes that move?

A. They have a hoist on the motor.

Q. On the vessel?

A. The hoist is operated by an electric motor.

Q. Do you know how many tons this vessel was?

A. I really don't know.

Q. About how long was it?

A. 130 foot.

Q. 130 foot long.

A. I'd say 30 foot wide, I really don't know.

Q. On November 5, 1951, did Senko—that evening, was there anything unusual about the weather that night?

A. I think that's the night we had that big snow.

Q. Did Senko have occasion to go ashore that night?

A. I believe he did go ashore.

Q. All right, was there a shack on the shore there?

A. Yes.

Mr. Broderick: Let's let the witness tell what was there, a shack or shelter or what it was.

Mr. Moran: What was there? Was there some kind of a building or something ashore that Senko was supposed to go to that he usually went there?

A. They have a building out there; I don't know if Senko went there; that's where the men stayed, where they ate their lunch and when the weather was bad they went in.

Q. Was there a stove there.

A. Yes.

Q. State, if you know, whose building that was.

[fol. 88] A. I assume it belonged to LaCrosse Dredging Company.

Q. Was that used by LaCrosse Dredging Company employees?

A. It was.

Q. And were there any other employees you know of that used that shack or shed or shelter?

A. I don't know; maybe somebody might stop in there and get warm from some of the other crafts.

Q. Did you know of any doing it?

A. That wasn't my duties on the shore.

Q. When Senko—On November 5, 1951, prior to November 5, 1951, did you ever see anything that floats come through the south mouth of that canal and up toward Lock 27?

Mr. Broderick: I object to that "anything that floats".

A. At this particular date?

Mr. Moran: No, before November 5, 1951. You understand that question, before November 5, 1951?

A. I've seen boats go up and down.

Judge Lueders: The form of the question—

Mr. Broderick: Yes, the form.

Mr. Moran: Well, it's probably improper. I thought I would broaden it enough.

A. Yes, I've seen boats come up there.

Judge Lueders: Objection sustained.

Mr. Moran: If I say anything that floats comes up there, it's a perfectly proper question; it might be a duck, you can't tell.

Mr. Broderick: That's the point; I think we ought to know what you're talking about; objection sustained I understand the Court to say.

[fol. 89] Mr. Moran: Did you see any vessels, any vessel, motor boat, row boat, barge or anything like that come through there prior to November 5, 1951?

A. Yes, I've seen boats go up through there.

Q. Did you ever see any—how far did they come up, do you know?

A. When they was building the locks they couldn't get through.

Q. Did they ever ship any stuff out of there?

Mr. Broderick: At what time?

Mr. Moran: Prior to November 5th.

A. I don't know; I don't think so.

Q. Do you know how the Wilkinson got in there?

A. We brought the Wilkinson up through the upper shoot.

Q. I see. When did you first start working for the LaCrosse Dredging Company? Did you work somewhere else before that job?

A. I worked off and on for the last fifteen years.

Q. Did you work on another dredge down there called the Calumet?

A. I worked on the Calumet digging the canal when we started.

Q. Did they ever lose a boat down there?

A. We sunk it; we never lost it.

Mr. Broderick: Object.

Judge Lueders: Sustained.

Mr. Moran: Now, Your Honor, that goes to the question of the navigability of this stream. I'm trying to show it was deep enough to sink a boat. I think it's perfectly proper.

Mr. Broderick: It's an objectionable question and I don't [fol. 90] believe Mr. Moran ought to state the purpose otherwise he might as well testify.

Mr. Moran: The purpose of it is—I'm offering it for that purpose only.

Judge Lueders: Well, sustained; the objection will be sustained.

Mr. Moran: As to the form?

Judge Lueders: Well, that doesn't appear to the Court that that's proper without at least some preliminary foundation for it.

Mr. Moran: You may cross examine.

Cross-examination.

By Mr. Broderick:

Q. Mr. Sanders, I take it you are a member or were a member of the operating engineers, is that true?

A. Yes sir.

Q. Affiliated with the American Federation of Labor.

A. Yes sir.

Q. One of the craft unions, is that true?

A. That's right.

Q. And has that been continuously true during the time

you have been talking about here when you worked off and on for the LaCrosse Dredging Company?

A. That's right.

Q. You weren't a member of the National Maritime Union, were you?

A. No sir.

Q. Or the Marine Engineers Benevolent Association.

A. No, sir.

[fol. 91] Q. Nor the Master Mates and Pilots.

A. I carry an operator's license; that comes under the Coast Guard now.

Q. When you were employed by the LaCrosse Dredging Corporation on and prior to November of 1951, you were working as a member of the operator engineers' local, is that true?

A. Yes sir.

Q. And did that local have a designated number?

A. 520, East St. Louis.

Q. And it has jurisdiction of the Tri-Cities' area here in Madison County, is that so?

A. Yes sir.

Q. Now, you say that the dredge was brought through the upper shoot?

A. Yes, it was brought through the upper shoot but I didn't get—you didn't ask me the rest of it.

Q. Now, the shoot you're talking about, is that the Gabaret Shoot?

A. That was the upper end of the Gabaret Shoot, if I remember right.

Q. Now, this dredge had no ability to move under its own power, did it?

A. No.

Q. It had to be moved from place to place by other types of equipment.

A. With two boats.

Q. And the motors you have described as being on the boat are motors used in connection with driving the pump and running the generator.

A. That's right.

[fol. 92] Q. And not motors used to propel the boat.

A. No.

Q. When you came through this shoot or the upper shoot, I'll ask you if it isn't a fact that this dredge worked its way in.

A. We dug our way in the mouth.

Q. And when you dug your way in, do you mean by that that there wasn't sufficient water to enable you to come through?

A. There wasn't enough.

Q. And you dug your way in what manner?

A. We pumped our way through a couple hundred feet at a time, I'd say.

Q. That is, you would pump out enough of the mud or silt or the sand to make room for water that would enable you to float or the dredge to float, is that right?

A. Yes.

Q. And by that plowing operation you did get down to the Lock 27 or near that area.

A. We pumped through one place and floated for a while and then we'd come to another place and had to dig it out.

Q. That was true in November of 1951, was it?

A. That was before that, yes sir.

Mr. Moran: I didn't get that answer.

A. I say that was sometime before that.

Mr. Broderick: You came in before that but I'm saying that situation was still true in November of 1951, wasn't it?

A. Yes.

Mr. Moran: What situation are you talking about?

[fol. 93] Mr. Broderick: The situation—

Mr. Moran: Before or after?

Mr. Broderick: He understands I think. The water situation was the same in November of 1951, was it, when you plowed your way in.

A. Un-huh.

Q. You say as a young man or boy you were familiar with this section.

A. Yes sir.

Q. And this Gabaret Shoot and Mosentine Island.

A. Yes sir.

Q. And at one time I believe you said you went through there with a row boat.

A. We went through in a small boat; had a star engine in it.

Q. Now, you don't recall any river travel that went through there, barges or river boats or anything of that kind.

A. That I never saw.

Q. So far as your knowledge and experience is concerned there was never any river traffic through there, was there?

A. I don't know.

Q. I say so far as you do know that's the fact.

A. That's right.

Q. Now, your job as a member of the operating engineers at the time you were employed by LaCrosse Dredging Corporation was to operate the machinery or the motors on the dredge, is that right?

A. Yes sir.

Q. And the purpose of your operating those motors was to run the pump which in turn took the silt and mud out of the bottom of the area where you were working and carried [fol. 94] it through their pontoon line and deposited it on the shore, is that so?

A. Yes sir.

Q. Now, in November of 1951 and prior to that time, this Lock 27 was in the process of being built, wasn't it?

A. Yes sir.

Q. And do you know, as a matter of fact, that it wasn't until May 9 of 1953 that the locks were open and dedicated?

A. Yes sir.

Q. And the first traffic through the canal went through in April of 1953.

Mr. Moran: I'm going to object to that, Your Honor, as being immaterial; the fact when it was opened or dedicated wouldn't make any difference in the navigability of the stream.

Judge Lueders: Overruled.

Mr. Broderick: The question that I asked you, Mr. Sanders, was as a matter of fact, to your knowledge, the first traffic went through the canal in April of 1953.

Mr. Morán: I object to that. Do you mean the locks, Mr. Broderick, or the canal?

Mr. Broderick: I said the canal, through the canal.

A. The first boat that went through the locks was the Calumet dredge.

Q. That was in April of 1953?

A. I don't know the date but it was the first that went through there.

Q. At least in 1953, you say that would you?

A. Yes.

Q. Do you know up to that time there hadn't been any boats go through?

[fol. 95] A. To my knowledge, no, they couldn't get through on account of the locks.

Q. Now, the purpose in working as you have indicated you were doing on this dredge, south of the lock in November of 1951, was to continue this digging operation, wasn't it?

A. Yes.

Q. And you say the area in which you were working was about 200 feet wide?

A. I believe it was.

Q. And what you were doing was making the thing wider and deeper, was that it?

A. Yes sir.

Q. As you went south from that point—you don't mean to indicate the water was that depth from there down to the river, do you Mr. Sanders?

A. At that time it wasn't that deep.

Q. And as a matter of fact at that time in November of 1951 the water south of the area where you were digging, in between there and the river, wasn't sufficient to float the dredge, was it?

A. No.

Q. Now, the oiler who was on the dredge in 1951 and in November, was he a member of the operating engineer's local too?

A. Yes sir. He could have been a permit man but it was the same; they're the same as a member.

Q. In any event, he was under the jurisdiction of the

operating engineers' local, the same craft union, you belonged to.

A. Yes.

Q. And as a matter of fact, to your knowledge, Mr. Senko [fol. 96] at that time was a member of the laborers' local, wasn't he?

A. Yes, sir.

Q. Now, you worked an eight hour shift, did you, in November of 1951?

A. Yes sir.

Q. Were you paid an hourly rate?

A. Yes sir.

Q. You didn't sleep on this dredge, did you?

A. Not that I know of; if I went to sleep operating—

Q. In any event, what I'm getting at, there weren't quarters provided for you for that purpose on that dredge.

A. No.

Q. And there wasn't any cafeteria or place to serve meals, was there?

A. No sir.

Q. And when you came on you brought your food with you, did you?

A. We made coffee and things like that.

Q. But you brought your lunch and ate on the dredge the lunch that you brought with you, is that right?

A. That's right.

Q. And did you work five days a week?

A. Yes sir.

Q. Were you paid overtime when you worked more than eight hours in a day or forty hours in a week?

A. Yes sir.

Q. That's specified by your arrangement with your union, was it?

A. Un-huh.

[fol. 97] Q. Now, Mr. Senko was employed as a laborer, wasn't he?

A. Call him a laborer or deckhand, it didn't make any difference.

Q. When he came out there to work you say he did some work on the shore and some work—

Mr. Moran: He didn't say that. I object to that, Your Honor, he didn't say that in that way.

Mr. Broderick: Will you let me ask him and he can say whether he did or not.

Mr. Moran: After all, you're not supposed to put the words in his mouth.

Judge Lueders: Let's have the question.

Mr. Broderick: Do you have the question in mind?

A. Jake worked on the dredge. If there was anything to take to the bank, he took it. If hanging pipe or anything like that, Jake didn't do that.

Q. Are you referring particularly to November of 1951 or before that time?

A. At all times that Jake first come on the dredge. He came on there as a deckhand or whatever you want to call him.

Q. All right, and you say he brought oil over to the dredge, is that what he did?

A. Jake brought the water over.

Q. If somebody wanted shovels on the bank he would take the shovels over there, is that what you said?

A. That's right.

Q. I'll ask you if he didn't work around tractors on the bank; didn't you see him do that?

A. I never saw him.

[fol. 98] Q. Are you acquainted with Mr. Lakin?

A. Yes sir.

Q. Were you there while Mr. Lakin was working on that job?

A. Yes sir.

Q. And that was sometime before November of 1951, wasn't it?

A. I believe so.

Q. And don't you know it's a fact Mr. Senko worked with Mr. Lakin helping him set stakes on the bank?

A. I don't know that.

Q. You didn't see him at any time cleaning mud off of the caterpillars on the bank?

A. No sir.

Q. And what he actually did was clean up, is that it, around the dredge, is that what you say he did?

A. Yes.

Q. Filled the water cooler and things of that sort.

A. Yes.

Q. Did he work an eight hour shift to your knowledge?

A. Yes sir..

Q. Do you know whether he was paid on an hourly basis?

A. I believe that's the custom of the company, and I believe that's the way he was paid.

Q. In other words, he worked on the same shift you did.

A. Yes.

Q. That means eight hours a day, five days a week, and that was true of the four of you working there together.

A. That's right.

Q. Now, aside from the maneuver that you have described here that the barge made, the dredge made as it was working [fol. 99] in the river, it didn't either travel upstream or downstream, did it?

A. No, we had to back up; we'd back up and make a new cut or something like that.

Q. In other words, what you were doing was getting situated in the area where you were working to the place that you could do your digging and then as you needed to move one way or the other, you took up tension on these lines that you have told us about.

A. That's right.

Q. But so far as running up and down the river or anything of that kind under its own power, this dredge didn't do that, did it?

A. No.

Q. And whatever lights were put out, if there were any, were put out as marker lights to enable you, as an operator, to know where to dig.

A. That's right.

Q. And they weren't put out there for the purposes of navigation.

A. No.

Mr. Moran: Just a minute; please. I'm objecting to that unless he says what navigation is.

Judge Lueders: Overruled.

Mr. Broderick: Mr. Sanders, when this pontoon line that

you have talked about—that's a pipe, isn't it, that is used to convey the material from one place to another.

A. That's right.

Q. After that pontoon line was in place, was that used as a walkway getting from the dredge over to the shore?

[fol. 100] A. Yes, there was a walkway.

Q. And was there some method or protection provided on that line so that you could walk it in safety?

A. There was a guard rail on it, government regulations, had to be.

Q. That afforded a means of getting from the barge over to the bank, is that true?

A. That's right.

Q. And from the bank to the barge. Now, during the time that this dredge was moving the material from below the surface of the water over to the bank, there were also other moving pieces of equipment working on the bank, isn't that true?

A. Yes sir.

Q. And those were tractors, graders, scrapers, caterpillars, something of that sort.

A. Yes, dragline and cats.

Q. After that material was moved onto the shore, then these other pieces of equipment there, your dragline and cats, moved it out and built it up, is that right?

A. That's right.

Q. So that was part of this same earth moving job in which you were engaged as an operating engineer on the barge.

A. That's right.

Mr. Broderick: I think that's all.

Redirect examination.

Mr. Moran: The whole earthmoving operation emanated from the dredge, is that correct, Mr. Sanders?

A. That's right.

Mr. Moran: Now, these draglines and cat operators [fol. 101] worked on the shore, they didn't wear life jackets, did they?

A. No.

Q. I see. You say it was a government regulation about putting a guard rail as you walk those pipes or pontoons to go ashore. Was there also a regulation about wearing life jackets as you went there?

Mr. Broderick: I don't think that's material.

Mr. Moran: He was trying to show, Your Honor, about the nature of this thing as they walked back and forth and I think I'm entitled to show what they were supposed to wear.

Mr. Broderick: I didn't ask him about any government regulation; he volunteered that, and I don't think I'm bound by it, and I don't think the government regulation about what Mr. Moran is inquiring about is proper.

Judge Lueders: Sustained.

Mr. Moran: Did you have any orders from the company or anyone over you about wearing life jackets when you walked on those pipes?

A. Yes.

Mr. Broderick: I object to that as repetition.

Judge Lueders: Overruled.

Mr. Moran: You may answer that.

A. Yes.

Mr. Moran: He said yes there was regulations you were supposed to wear them, is that correct?

A. Yes.

Q. You said something I believe when you were examined about having a license; is that a marine license?

[fol. 102] A. A Coast Guard license.

Q. Was that necessary for you to have that to work aboard that vessel?

A. Only thing required was a tankerman's license.

Q. And you had that license that day.

A. Yes.

Q. You don't get a tankerman's license if you work ashore, do you?

Mr. Broderick: I object to that.

Judge Lueders: Overruled, it may stand.

Mr. Moran: That's all, Mr. Sanders.

Recross-examination.

Mr. Broderick: Just a moment, Mr. Sanders. You didn't wear any life jacket or life preserver while you were on the dredge, did you?

A. No sir.

Q. That is true of everybody else on the dredge, isn't it?

A. That's right.

Q. And when you were hired in as a member of the operating engineer's local to run this piece of equipment on the dredge, your membership in the operating engineers was all that was necessary to qualify you to do that job, wasn't it?

A. That's right.

Mr. Broderick: That's all.

Mr. Moran: Mr. Sanders, with reference to these life jackets that he asked you about aboard the dredge, was it that anybody that worked inside the engine room was not supposed to wear one?

A. No.

Q. How about people on the outside deck.

[fol. 103] A. Yes.

Q. Was Senko supposed to wear a life jacket?

A. Yes.

Q. And you didn't have to.

Mr. Broderick: Wait just a minute! Where does the supervision come from—

Mr. Moran: I just want to show Senko is more of a seaman than he is.

Mr. Broderick: Just a minute, Mr. Moran! I know you're interested in making that kind of comment for the benefit of the jury, and I ask the Court to at least caution you about it.

Judge Lueders: Let's not have any talk across the table. Let's go on trying the case; the objection is proper.

Mr. Moran: I have no more questions of Mr. Sanders unless you have.

Mr. Broderick: Nothing further.

Mr. Moran: Would you mark this Plaintiff's Exhibit 7, please.

(At this point a U.S. Army document was marked for identification as Plaintiff's Exhibit 7)

Mr. Broderick: I have examined the exhibit which is identified as Plaintiff's Exhibit 7, which purports to be an extract from the construction cross sheets for the Chain of Rocks Canal project, contract numbered A23065 Eng. 1346. I am not aware of what that particular contract number means or is intended to mean and I think the exhibit which shows on its face that the approximate depth of water in the lower canal Chain of Rocks project on 5 November 1951 and below Station 0 line 00, 14.5 feet, would hardly be helpful to prove or disprove any issue in this case because of the fact it would not show anything more than the depth of [fol. 104] water at one station. Where that station is, the exhibit does not purport to point out, and how many other stations where the depth of the water would be considerably less or considerably more isn't shown. I think the exhibit, while the authentication of it is proper, would certainly be confusing to the jury as tending to indicate that the depth shown here of the water was the depth that might have extended for a very long distance and without explanation. It certainly wouldn't be proper to put this extract into the evidence, even assuming that it is a proper certification of an extract, but as an extract I think it would be self serving and confusing and would not tend to properly prove or disprove any issue that we have here. There is no method of looking at it and telling for what area the depth of water is intended to be, the depth as shown or whether it is just at one particular spot or at other areas. I think it is misleading on its face and it does not have a lot of pretty blue ribbon on it; still I don't think it's proper as an exhibit.

Mr. Moran: Station 00, as shown on Plaintiff's exhibit Your Honor, is the mouth of the lower end of the canal and there would be testimony to that effect right away.

Judge Lueders: Why don't we hold this until that's been done.

Mr. Moran: I have some other exhibits here that you might as well look at, Mr. Broderick, and I'll offer them at the same time. I'm going to show you these but we'll have to go over them one by one, but there are some that may be objectionable. I have a whole bunch of certifications here at one time.

(Discussion off the record)

[fol. 105] A. M. THOMPSON, JR., having first been duly sworn, testified as follows:

Direct examination.

By Mr. Moran:

Q. Your name please, sir.

A. A. M. Thompson, Jr.

Q. And Mr. Thompson, are you an officer in any dredging corporation?

A. Yes I am.

Q. What corporation is that?

A. The LaCrosse Dredging Corporation.

Q. Is that the name of the company?

A. Yes sir.

Q. What is your office there, sir?

A. Vice-president.

Q. And who is the president?

A. Mr. A. M. Thompson.

Q. Senior?

A. That's it..

Q. Now, Mr. Thompson, does your corporation own and operate a dredge named James Wilkinson?

A. Yes sir.

Q. And on November 5, 1951, did your corporation own and operate that same dredge?

A. Yes sir.

Q. And on November 5, 1951, were you operating that dredge in the Chain of Rocks canal project?

A. Yes sir.

Q. And now, there's a place in the Chain of Rocks Canal [fol. 106] proper that's known as Lock 27, is that correct?

A. That's correct.

Q. And that canal runs generally north and south, is that correct, sir?

A. That's correct, sir.

Q. Now, north would be up toward Woodriver, wouldn't it?

A. Yes sir.

Q. And south would be down toward Venice or St. Louis.

A. St. Louis, yes sir.

Q. Now, Mr. Thompson, on November 5, 1951—did you have anything to do with the supervision of that job, Mr. Thompson?

A. Yes sir.

Q. And who were you performing that job for?

A. LaCrosse Dredging Corporation.

Q. Well I mean was LaCrosse Dredging Corporation contracting with someone else?

Mr. Broderick: I don't believe that would be material, if your Honor please.

Judge Lueders: Well, let's see, what was the question?

Mr. Moran: I asked if LaCrosse Dredging Company was performing this work for anyone else.

Judge Lueders: I don't believe it's material.

Mr. Moran: Well, it will be.

(Discussion off the record)

Mr. Moran: I'll withdraw the question. Now Mr. Thompson, that Chain of Rocks canal project there stretched from up around Hartford down past Granite City for about a mile, didn't it, or past the Engineers Depot? In other words, it went to the mouth of the Mississippi River out to the Mississippi River.

[fol. 107] A. That's correct, yes.

Q. Now, were you working north or south of this Lock 27 on November 5, 1951?

A. South.

Q. And do you know about how far south you were, sir? If you don't know, that's all right.

A. I couldn't give you the exact location, no sir.

Q. Now, do you know the south part of the lock, the extreme south portion of Lock 27? Do you know what I'm talking about? Not the canal but the extreme southerly end of Lock 27. Lock 27 is about 1200 feet long, isn't it?

A. Yes, it is.

Q. And that lock was put in there I presume to aid navigation, in aid of navigation for the Mississippi River.

Mr. Broderick: I object to that.

Mr. Moran: I'll withdraw it.

Judge Lueders: Yes, withdraw the question.

Mr. Moran: Do you know what the lock was being built for?

A. It was a component part of a project to by-pass the Chain of Rocks reach of the Mississippi River.

Q. When you say by-pass, what do you mean, Mr. Thompson?

A. To go around the Chain of Rocks reach of the river.

Q. So what could go around it?

A. Tow boats.

Q. And any other kind of river craft?

Mr. Broderick: I don't think this witness has been qualified to answer that.

Mr. Moran: Well, I'll withdraw the question; it's not too [fol. 108] important. Now, you know when I talk about the south end of Lock 27, you know what that is; that's the end of the lock closest to Venice, isn't that correct, or to St. Louis?

A. To St. Louis, yes sir; I don't know the location of Venice, the exact location of Venice.

Q. I'm not trying to cross you up. Now, the northerly end would be the closest end toward Woodriver, would that be right?

A. Yes sir.

Q. And this canal, the extreme southerly end of it, goes into the Mississippi River, is that correct?

A. That's correct.

Mr. Broderick: At the present time, George?

Mr. Moran: Well, I said it goes into the Mississippi River. I guess I can't make it any plainer than that.

Mr. Broderick: I think the time is important. We're talking about November of 1951, and I think there'll be a difference if you're talking about today or 1953 or 1951.

Mr. Moran: He wasn't out there today. I'll ask him about some other date. When was the last time you were out there, Mr. Thompson?

A. I would estimate about a month ago.

Q. All right, about a month ago. Was the south end; did that go into the Mississippi River?

A. Yes it did.

Q. And the north end, did that go into the Mississippi River?

A. Yes sir.

Q. Now, south of this lock there, Mr. Thompson, is where [fol. 109] Gabaret Slough was, is that correct, or Shoot, rather?

A. South of the locks?

Q. South of the locks followed old Gabaret Shoot, didn't it? If you don't know just say so.

A. Yes, it did.

Q. Now, Mr. Thompson, when this project is carried on, they have certain designations that they call—or certain markers every hundred feet or so, don't they? They call that Station One, or Two, or something like that, stations.

A. The work is laid out by stations, yes.

Q. The work is laid out by stations, and around November 5, 1951, do you know what station, about what station this dredge was working?

A. No sir, I couldn't give you the exact location of the dredge.

Q. I mean could you give us the approximate location.

A. Would you clarify approximate, please.

Q. Can you give us within a couple of hundred feet north or south.

A. I would say approximately Station 54.

Q. Approximately station 54. Now, it could be a higher station or lower station than that, is that correct?

A. Yes sir.

Q. Now Mr. Thompson, what station is the southerly tip of the canal? Is that Station Zero? Don't you start from zero and go on up?

A. Of the canal, yes.

Q. Station zero, zero, zero.

A. That's correct.

[fol. 110] Q. And that's the mouth of the canal coming—going north up to the lock at a point up north to the lock.

A. That was the lower extremity of the work we were to do, that was to be done in there of the canal project.

Q. I mean is the mouth of the canal—is this the mouth of the canal?

A. This general area, yes (indicating on chart).

Q. Is that about where Station Zero Zero Zero is there?

A. Yes sir.

Q. When you go up a hundred feet, is that Station No. One?

A. Yes sir.

Q. Station No. 2 would be 200 feet.

A. Yes sir.

Q. When you got up to 54, you'd be at fifty-four hundred feet, is that correct?

A. Yes sir.

Q. And 59 would be fifty-nine hundred feet.

A. Yes sir.

Q. Now, when you started that project south of the lock, which way did you start working? To the south or to the north?

A. Your question isn't clear enough, Mr. Moran.

Q. When you started to work for—when did you start on that contract in November of 1951; do you know that?

A. The original contract started in 1947.

Q. Now, and that was to do certain dredging work in this particular canal, was it not?

A. In the lock, sir.

Q. And after you got through dredging out where the locks were, you went south of the lock to dredge out down to the Mississippi River.

[fol. 111] A. That was under a separate contract.

Q. I can't ask you about the contract. I just asked you what you were doing. You were going south, were you, in November of 1951. Were you working south down toward that—

A. No sir, we were not.

Q. Which way were you working?

A. It would be in the area of the lock contract.

Q. Now, had you worked on Station 59?

A. We may have done some work on Station 59.

Q. You could have been working on Station 59 on November 5th, couldn't you?

A. I don't know.

Q. Well, in other words, you were the only dredge working from south of the lock—they call that downstream, don't they, from south of the lock up to the mouth of the Mississippi River toward St. Louis? You were the only dredge operating in there on that day, weren't you?

A. Yes.

Q. And your company was the only one doing dredge work there for some time, isn't that right?

A. Yes.

Q. And so if there were a dredge working around Station 59 on or around this particular date of November 5, 1951, it would have been your dredge, wouldn't it?

A. Yes sir, it would have.

Q. And you weren't doing any dredging above the locks at that time were you, on November 5, 1951? Did you have any of your other dredges working there?

[fol. 112] A. On the lock contract?

Q. I can't ask you about the contract. Did you just have any dredges working up there? If you don't remember, say you don't remember.

A. Yes, we did have them working above there.

Q. Up above?

A. Yes sir.

Q. Now, the James Wilkinson, to your knowledge, was the only dredge working south of Lock 27 in that area between the southerly part of Lock 27 and the southerly end of the canal, is that correct?

A. That's correct.

Mr. Moran: That's all.

Cross examination.

By Mr. Broderick:

Q. Mr. Thompson, were you familiar—

Mr. Moran: Your Honor, this examination is under Section 60. I don't believe it's proper to cross examine.

Mr. Broderick: I didn't understand him so called.

Mr. Moran: I called him under Section 60.

Judge Lueders: Under the rules you are not permitted to cross examine or to examine at this time. You have to call him in your own terms. I think it was the intention of counsel to call the witness under Section 60, and so I'll sustain the objection to cross examine.

Mr. Moran: Now, Your Honor, I would like to re-offer, as far as that particular exhibit is concerned—this one exhibit I would like to offer at this time in evidence. That shows [fol. 113] the depth of the water at Zero Zero Zero.

(Discussion off the record.)

Mr. Moran: I'll withdraw it at this time.

HARVEY GRUENDENEMANN, having been first duly sworn, testified on behalf of Plaintiff as follows:

Direct examination,

By Mr. Moran:

Q. Your name is Harvey Gruendenemann.

A. Yes sir.

Q. Where do you live, Mr. Gruendenemann?

A. Granite City, 2004 Dewey.

Q. What is your business or occupation?

A. I'm a laborer.

Q. How long have you been a laborer?

A. I've been a laborer since 1947, 1946.

Q. Now, on the 5th day of November 1951, were you employed—did you work for somebody on that date?

A. Yes sir, I worked for LaCrosse.

Q. LaCrosse Dredging Corporation?

A. Yes sir.

Q. Were you acquainted with Jacob Senko?

A. Yes sir.

Q. Where did you work, Mr. Gruendenemann?

A. I worked on the bank and on the dredge; I was labor foreman at that time.

Q. I see; where did Senko work?

[fol. 114] A. On the dredge.

Q. And what did he do on the dredge?

A. He was a deckhand on the dredge; he worked—

Mr. Broderick: Well, of course, the same objection, Your Honor, to that as previously made; his characterization rather than a description of what he did.

Judge Lueders: Sustained.

Mr. Moran: Tell them what he did. What in general were his duties aboard the dredge?

A. He cleaned the decks outside and he swept everything and kept the tools that the laborers worked with in place, and he'd take care of the row boat and do all odd jobs on the dredge.

Q. Was his job confined to the dredge, sir?

A. Yes sir.

Q. Now, I have an exhibit here marked Plaintiff's Exhibit 8 and I ask you if you recognize that exhibit.

(a picture of said Chain of Rocks Canal having been marked at this point Plaintiff's Exhibit 8 for identification)

A. Yes sir.

Q. Is that a picture of the Chain of Rocks Canal?

A. Yes sir.

Q. Now, I'm going to point my finger to a certain area there and ask you if that is Lock 27.

A. Yes sir.

Q. I'm going to turn this around as soon as we get it admitted. Now, from Lock 27 down to the south mouth of the canal there, is that area there and does that picture substantially show the condition as of November 5, 1951? Is [fol. 115] that substantially correct as far as showing the topography of it?

A. Yes sir, to the best of my knowledge it does.

Q. Was there a shack or a shed on the 5th day of November on the east bank of that canal?

A. Yes sir.

Q. And state, Mr. Gruendenemann, who used that shack.

A. Well, I'll tell it as best I can. We had this shack, as we called it. We'd keep our bank tools in it, our lunch in it; we put our clothing in it we didn't need. If we'd get wet or something, we'd go in there to get out of the shelter when we weren't working.

Q. And who furnished that shed?

A. LaCrosse Dredging Corporation.

Q. And was there a stove in that?

A. Yes sir.

Q. What was the stove used for?

A. Keep people warm and dry, your clothes if they got wet, or sometimes you'd have wet clothes and take them off.

Q. Now, Mr. Gruendenemann, was that shed and shack used exclusively by LaCrosse Dredging Company employees?

A. Yes sir.

Q. Before the 5th day of November 1951, did you ever see any watercraft come in and out of that canal from the south mouth?

A. Yes sir, I saw tugs, you know, small—

Q. How did they come in?

A. Well, they'd come in from the river end, that would be the St. Louis side, the closest from the south.

Q. I see. Now, you described what Senko did aboard this vessel. Did you have a terminology that you used for a [fol. 116] man that did that type of work?

A. Pardon?

Q. Did you call them something or other, the type of work he did?

A. Yes.

Q. What did you call him?

Mr. Broderick: I object to what he called him.

Judge Lueders: Overruled.

Mr. Moran: You may answer that.

A. I called him a deckhand on the dredge.

Mr. Broderick: Move to strike the answer.

Judge Lueders: Yes, sustained; I don't think what this man called him—

Mr. Moran: What was he generally called?

Mr. Broderick: I ask the jury be instructed to disregard the answer.

Judge Lueders: Yes, the jury will disregard the previous answer. Let's have the next question.

Mr. Moran: The type of work he was doing, what was that generally known as around there? Was it generally known as some particular job or job classification?

A. Yes sir, he was cleaning up the dredge.

Q. What did they call that?

A. Deckhand.

Mr. Broderick: I object to that unless there's a basis laid for it.

Judge Lueders: It may stand, overruled.

Mr. Moran: When they come off these dredges to go ashore, how would they go ashore?

[fol. 117] A. Well, if the tug wasn't busy or if there was, like I say, we needed something from the dredge say like tools or some certain thing, and the tug wasn't busy, the tug would take them over. If not, we'd row over with the row boat from the dredge to the bank because we never got too many tools on the bank to work with.

Q. What did you use for the men ashore to signal the vessel with? At night what did you use to signal them with?

A. A lantern as a rule.

Q. Who would bring those lanterns ashore? What particular person aboard this vessel would bring the lanterns ashore?

A. It was Jake's job to keep them filled and if we needed some, he was in—the row boat was generally tied on the dredge and if we couldn't get the tug at that particular time, Jake would bring them to the shore.

Mr. Moran: You may cross examine.

Cross-examination.

By Mr. Broderick:

Q. Mr. Gruendenemann, you are a laborer, are you, sir?

A. Yes sir.

Q. And as such you have an affiliation with some particular labor organization, do you?

A. Yes sir.

Q. What is that organization?

A. I'm working out of the Granite City local, 397; that's what I work out of.

Q. And 397 is a local of what international Union?

A. International Laborers and Hod Carriers.

[fol. 118] Q. And that forms one of the craft unions in the building trades, doesn't it?

A. Yes sir.

Q. How long have you been a member of that organization?

A. I've been a member of the laborers organization—I joined in 1945 but not in Granite City.

Q. And you have been acquainted with Mr. Senko for a good many years, have you?

A. Yes sir.

Q. He is a member of your local and the International Hod Carriers.

A. A member of the International Hod Carriers for a different local, in a different territory all together.

Q. He lived in November of 1951 at Mt. Olive to your knowledge, did he not?

A. Yes sir, to the best of my knowledge.

Q. And had his affiliation with the local having jurisdiction in that area, is that right?

A. Yes sir.

Q. So when he worked out of your local did he do it on a permit or how?

A. He worked out of the Granite City local on a permit.

Q. And that's your local that I'm talking about.

A. I worked out of this local on a permit also.

Q. You were a permit man, too.

A. Yes sir.

Q. Now, in November of 1951 and on the 5th day, you were the labor foreman on the LaCrosse job, were you?

A. Yes sir.

[fol. 119] Q. And as labor foreman, who do you have under you?

A. The men working for me, you mean?

Q. What men did you have under you, yes sir.

A. Laborers.

Q. How many were there in November of 1951?

A. Well, to the best of my knowledge it would be about I'd say 9 roughly, I don't remember for sure.

Q. Were you the job steward so to speak?

A. No sir, I wasn't a steward, I was just a foreman.

Q. And as foreman what duties did you have to discharge on that job so far as the laborers were concerned?

A. I placed the men in their particular jobs.

Q. You were employed by the dredging company, were you?

A. I worked for LaCrosse Dredging Corporation, yes.

Q. And did you work on an hourly rate?

A. Yes sir.

Q. And then as a member of your labor organization by agreement with LaCrosse as I understand it, you placed the laborers on various positions, did you?

A. Pardon?

Q. You were an employee of LaCrosse and paid an hourly rate.

A. Yes sir.

Q. But as a member of your labor organization, hod carriers, by reason of that relationship you place the men, the laborers, at the jobs they were doing for LaCrosse in November of 1951, is that right?

A. Yes sir.

Q. Now, you say you were on and off of the Wilkinson in November of 1951, were you?

[fol. 120] A. Yes sir.

Q. And when you were on the Wilkinson what was your purpose in being there?

A. I'd see how things were going there and how the pontoon line looked and—

Q. Did your laborers put down the pontoon line?

A. Yes sir.

Q. And did they put the guards on the pontoon line?

A. They were on there when the pontoon line come in.

Q. That's the line that came from the dredge out to the shore, isn't that right?

A. Yes sir.

Q. And you, in discharging your duties as a labor foreman, would go along and see how the pontoon line was and get on the barge and see what things were being done there, would you?

A. Yes sir.

Q. And then when you finished you would come back on the bank and supervise the work going on there.

A. Yes sir, I done what I was told and I'd pass the orders on.

Q. You weren't a member of the National Maritime Union, were you?

A. No sir.

Q. Or the Marine Engineers Benevolent Association.

A. No sir.

Q. Nor the Master Mates and Pilots.

A. No sir.

Q. As far as you know Senko wasn't either, was he?

A. No sir, not to my knowledge.

Q. And his coming onto the job was coming on as a laborer, as a member of your organization.

[fol. 121] A. Yes sir, he was sent there through this local.

Q. Now, all of the laborers, including Mr. Senko, worked at an hourly rate, did they?

A. Yes sir.

Q. Was that rate determined by an agreement between your organization and employers, is that how it was?

A. Yes sir, I'd imagine it was; there was a fixed scale.

Q. All drew the scale.

A. Yes sir.

Q. And the laborer scale was \$2.00 an hour or thereabouts.

A. Yes.

Q. And you all worked eight hours a day.

A. Yes sir.

Q. And five days a week.

A. Yes sir, most all the time, yes.

Q. And when you worked more than eight hours in one day or forty hours in a week, were you paid overtime?

A. Yes sir.

Q. Now, Mr. Senko or no other member of your labor organization force there lived on the Wilkinson, did they?

A. No sir.

Q. And they didn't sign any papers when they came to work or anything of that kind, did they?

A. No sir.

Q. And they didn't take—that is, the meals weren't provided for them.

A. No sir, they brought their own lunch.

Q. Went home at night.

[fol. 122] A. Yes, sir.

Q. Drove back and forth from their homes to work, is that right?

A. Yes, sir.

Q. And was that what Mr. Senko did, too?

A. Yes, sir.

Q. Were you on duty on the 5th of November of 1951, Mr. Gruendenemann?

A. I was on days.

Q. And what time did you go off duty on the 5th of November 1951 being on days?

A. My regular work shift stopped at 4 o'clock, approximately, maybe a few minutes sooner or later.

Q. Did you relieve at 3:30 on the job at that time?

A. Well, between 3:30 and 4, yes sir.

Q. And I'll ask you if it isn't a fact that it was the custom, which you knew about as a laborers foreman at that time, for the laborers to relieve on the half hour before the end of the shift?

Mr. Moran: Now just a minute! I'm going to object to that because there's no proof they relieved a half hour before. The man testified that the hours were from 4 to 8 and 8 to 4, and so forth; I object to that question.

Judge Lueders: Overruled, he may inquire.

Mr. Broderick: The Court says you may answer, Mr. Gruendenemann. I'm asking you if in November, and particularly on the 5th of November 1951 since that is the day we are interested in in this litigation, if it isn't a fact the members of your organization, laborers, relieved at the half hour before the end of the shift.

A. We started our shift 8 o'clock in the morning if all the [fol. 123] boys were there; sometimes they relieve a little early but our hours were from 8 to 4.

Mr. Broderick: I understand that, but when you started the work on the 5th of November 1951, isn't it a fact you started at 7:30?

Mr. Moran: If you remember.

Mr. Broderick: Yes, if he remembers.

A. I don't remember to the half hour, sir.

Q. And didn't you leave about 3:30?

A. Approximately, sometimes we wouldn't get relief until after 4. If a tug was busy or something our hours—we tried to keep it right at 8 hours. It was generally always 4 o'clock; I'd say fifteen minutes to, sometimes a little later, sometimes 3:30.

Q. Whenever your relief got there that was the time you left.

A. Yes, sir, when they were all there and it was about relief time we'd relieve.

Q. Now, when you worked on the 5th of November of 1951, where was it that you actually were on that day, Mr. Gruendenemann?

A. Where do you mean?

Q. With reference to the lock, where were you working that day?

A. In the south end of the locks on the St. Louis side of the locks, I'd say.

Q. And you told Mr. Moran that sometime before the 5th of November of 1951 you had seen a tug or two, I believe you said, come in from the south.

Mr. Moran: He didn't say that; he said he saw tugs; he didn't say that.

Mr. Broderick: All right, what did you see then?

Mr. Moran: Now wait a minute!

Mr. Broderick: Mr. Moran, this is cross examination.

[fol. 124] Mr. Moran: Mr. Broderick, you're not permitted to say "you saw a tug or two" when the man didn't say that; you're not permitted—

Judge Lueders: Let's see what the man did say.

Mr. Broderick: What did you say, Mr. Gruendenemann?

I don't mean to misquote you. Prior to the 5th of November of 1951 Mr. Moran asked you something about seeing water craft come in from the south end.

A. We brought our pontoons in that way.

Q. You say you saw tug or tugs or what?

A. Tug, we pushed them pontoons in that way.

Q. And when you say "we", who are you referring to?

A. LaCrosse Dredging Corporation, the men.

Q. And is that the tug that you were talking about having seen prior to the 5th of November come from the south up through the Gabaret Shopt?

A. From the river side, yes sir.

Q. Did you see any others?

A. To the best of my knowledge there was tugs I'd say. I think they belonged to LaCrosse Dredging Corporation; it's been quite a while back.

Q. Were those the only tugs that you can recall having seen come in from the south there prior to the 5th of November 1951?

A. Well, sir, yes, sir, I believe LaCrosse's tugs pushed that dredge in there; yes sir, I'd say yes.

Q. Yes, would mean those were the only tugs.

Mr. Moran: He didn't say that; he said he saw LaCrosse Dredging Company—

A. I thing at that particular time their own tugs brought their dredge in, yes.

[fol. 125] Mr. Broderick: What I'm asking you, the tugs you saw come in were the tugs of LaCrosse Dredging Company, is that right?

A. Yes, sir.

Q. Did you see any others, now that's what I want to know, prior to the 5th of November 1951, if you remember. I'm not trying to—

A. Well, I'm telling you that these tugs are in there but like I say, it's been quite a while ago, but I'd say yes, I saw some tugs in there.

Q. All right, do you know what the condition of the water was any place south of the Lock 27 aside from the area where the Wilkinson was working on the 5th of November?

A. You mean south of where the Wilkinson was working?

Mr. Moran: Just a minute, I'm going to object to the question because it's too general. He said the condition of the water. Confine it to a particular aspect of the condition. You might mean whether it's dirty or clean or what.

Mr. Broderick: I want to know first if he knows anything about the condition, then we'll get to that.

Judge Lueders: He may answer, overruled.

A. What do you mean sir, of the condition?

Mr. Broderick: Were you familiar with the condition of the water south of the place where the Wilkinson was working on the 5th of November 1951?

A. No, sir, I never sounded it or nothing.

Q. The locks were in process of being built were they in November of 1951?

A. Yes, sir.

Q. And you remember it was about April of 1953 before any traffic came through the locks?

[fol. 126] A. Yes sir, they opened the locks, yes sir.

Q. Mr. Moran showed you an aerial photograph here, which has been identified as Plaintiff's Exhibit 8, and you answered him I believe that substantially this photograph showed the conditions as they existed in November of 1951.

A. Yes, sir, the water and the locks; I'd say it looked just that way.

Q. Of course this is I guess an aerial photograph, isn't it?

A. Yes, sir, things look a little—but you can make out the locks and the canal there.

Q. On the 5th of November 1951 there was a dredge working out of the lock, wasn't there?

A. Yes, sir.

Q. And the locks hadn't been completed, had they?

A. No, sir.

Q. And the canal hadn't been completed south of the lock to the mouth of the river, had it?

A. No, sir, it wasn't completed, no.

Mr. Broderick: I think that's all.

Redirect examination.

Mr. Moran: From the south end of the locks to the southerly mouth of that canal, was that one stream of water, was that one continuous stream of water?

A. Yes, sir, there was water all the way from the locks to the river.

Mr. Moran: Okay, and how deep that water was you don't know of your own knowledge.

A. No, sir, it would raise and lower, we had high water and low water.

Q. Would it raise and lower with the river?

A. Yes, sir, I couldn't tell you just exactly how deep it was.

[fol. 127] Q. Is that water coming into that canal from the Mississippi River?

A. Yes, sir.

Mr. Moran: Your Honor, at this time I would like to offer Plaintiff's Exhibit Number 8 in evidence.

(Discussion off the record.)

Mr. Moran: Just a moment, I have another question. Mr. Gruendenemann, were Senko's duties confined to the dredge?

A. Yes, sir.

Mr. Broderick: I think that's repetitious.

Mr. Moran: I don't believe it was repetitious.

Judge Luëders: He has answered, overruled.

Mr. Moran: Okay, you may cross examine.

Recross-examination.

Mr. Broderick: You were on the job when Mr. Senko worked on the shore, were you not?

A. Pardon?

Q. You were on the job for LaCrosse when Mr. Senko worked on the shore.

A. No, sir, that happened in the evening I think.

Q. I'm not talking about the specific date.

A. Yes, sir.

Q. He did other tasks around there at other times, did he not, that is other tasks performed by a laborer?

A. On the dredge?

Q. No, on the bank, such as digging and using a shovel.

Mr. Moran: When, Mr. Broderick?

Mr. Broderick: Prior to the 5th of November 1951.

A. Any time he was ever out there he was working on the dredge.

[fol. 128] Mr. Broderick: You were never there when he did any other kind of work.

A. No, sir.

Q. And the other members of your organization, what did they do, the laborers?

A. We had a pontoon line gang. When we put in a pontoon or took one out, I'd get the bank gang to help do that work. There was about four of us, five, that generally always do that on the pontoon line. As soon as we had the pontoon in or took it out, that gang and me generally always went to the bank.

Q. Did they do anything else besides work on the pontoon line?

A. No, sir, not unless there was something to be coiled, a line or something to be unloaded on the dredge. We'd take two or three from the bank that could handle it, that would take more help to unload it; that's the only time—

Q. Did they work around tractors cleaning off the treads and things of that sort?

A. Yes, sir, the bank crew.

Q. Did they also shovel dirt and smooth up and manicure the bank and that sort of thing?

A. If it needed that.

Q. You mean the bank crew?

A. Yes, sir, the bank crew.

Q. What other kind of work did they do?

A. When they were building a levee around these spillways, building a levee, or if it was when the tractors were working they'd smooth off like you say and clean the tractors, but whatever generally come up we'd do.

Q. Whatever jobs were required to be done in the laborers' category, you would do it.

[fols. 129-135] A. Yes, sir, we would do it.

Mr. Broderick: That's all.

Mr. Moran: That's all.

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[fol. 136] WILLIAM TROJAN, having been duly sworn, testified on behalf of Plaintiff as follows:

Direct examination.

By Mr. Moran:

Q. Will you state your name, please.

A. William Trojan.

Q. And where do you live?

A. Route 4, Edwardsville, Illinois.

Q. Where are you employed?

A. At the Granite City Engineer Lock No. 27.

Q. And you work for the United States Government, sir?

A. Yes, sir.

Q. Now, on November 5 of 1951 where were you employed?

[fol. 137] A. The same place, at Lock 27.

Q. Did you have the same job?

A. No, sir.

Q. What was your employment on November 5, 1951?

A. I was acting as assistant lockmaster but still carried on construction payroll.

Q. And did your work at that time have anything to do with the government?

A. Yes, one hundred percent.

Q. Were you a government inspector?

A. Yes, sir.

Q. What in general was the nature of your duties at that time?

A. At that time, like I say, I was acting as assistant lockmaster and it concerned getting the operating machinery and equipment of the lock into operating condition.

Q. I see, and were you using those locks in November of 1951? I mean were you opening and closing them and so on and so forth?

A. I remember that at times for certain reasons that they were operated with temporary controls.

Q. What would be the reason? I mean why would they be operated with temporary controls?

A. For getting local plant there from below the lock to above the lock.

Mr. Broderick: I didn't understand, local plant?

A. Yes, equipment stationed there at the lock.

Mr. Moran: Now, prior to the 5th day of November 1951 did you ever have occasion to assist in taking soundings in that area?

A. Yes.

Q. About when was that?

[fol. 138] A. The early part of August.

Q. Of 1951?

A. Yes, sir.

Q. And what were you doing with relation to the soundings?

A. I was operating the boat we used to take the soundings.

Q. And what was the purpose of your taking soundings at that time, if you know?

A. Well, American Bridge wanted to come in there with some equipment to handle the bulkheads there at the job, to run a test on them, that is, place them in the proper recesses, and then on the lock—

Q. What are bulkheads?

A. They're temporary structures, fabricated steel, that are placed in the water at the upper end of the lock and at the lower end of the lock and then that permits pumping all of the water out of the lock chamber.

Q. Now, you say you took these soundings and do you know about what depth this water was from the south end of the locks up to the southerly end of the canal there?

A. Well, I know it was sufficient for these boats to use it.

Q. What would be the minimum that it would have to be then? It would have to be at least some depth of water for boats to use.

A. Well, I don't remember getting any soundings less than 10 feet.

Q. That would be all the way from the southerly end of the lock all the way up to the southerly end of the canal.

A. Yes, with this exception right at the lock, within oh around 100 feet there was a little obstruction directly in line with the intermediate wall; you could go to either side of that.

[fol. 139] Q. And what was this equipment that was brought through, can you tell us that?

A. It was a derrick boat and a barge.

Q. And where did they go after they got into the canal proper?

A. They came up to the lock wall and tied up.

Q. Did they go anywhere past that then?

A. They proceeded through the lock as necessity came up for moving these bulkheads; they went back and forth.

Q. You mean through the lock gates?

A. Yes, sir.

Q. You say they went back and forth through the lock gates and how were you operating the lock gates then?

A. The electrical contractor did that by his temporary controls.

Q. How long were they in there operating in and out of those lock gates?

A. Well, I would say that took around a week, maybe more, maybe less.

Q. When they got through did they haul any equipment or material out, any metal or anything?

A. Well, they came there in August, I believe it was, to put the bulkheads in, which they did. Then it was just a few days before Christmas before they completed the tests to take their plant back out.

Q. Were they going in and out of there all that time?

A. No, sir.

Q. Now this 10 feet depth that you said—strike that. Was there one continuous stream of water south of Lock 27 to the southerly most part of the canal?

[fol. 140] A. Yes.

Q. And was that water of the Mississippi River there in that canal?

A. Well, that's a mixture of Granite City sewer and Mississippi River.

Q. Granite City sewer came out and went in there and

when that Granite City sewer went out there, where would it go ultimately?

A. Into the river by way of the canal.

Q. And it's been doing that for how long?

A. Since it was dredged.

Q. Mr. Trojan, was this particular water in your opinion deeper or more shallow in November of 1951 than it was in August 1951?

Mr. Broderick: I object to that unless he knows.

Mr. Moran: I think he knows.

Judge Lueders: I think the form—

Mr. Moran: Was it deeper or more shallow than it was?

A. Deeper.

Q. Why do you say that?

A. Because when they came in to place those bulkheads to run this test, the river raised and thereby prolonged that test until December to when the river got back down again that they could complete it.

Q. Would this canal up from the lock south to the mouth of the canal, would that raise and lower with the river?

A. Yes, sir.

Mr. Moran: You may cross examine.

Cross-examination.

By Mr. Broderick:

Q. Mr. Trojan, your present position at the lock is what, please?

[fol. 141] A. Now, assistant lockmaster.

Q. And for what period of time were you employed in and around the lock?

A. I came in 1947 when there was still trees growing there.

Q. And stayed until the present, is that so?

A. Right.

Q. And has your stay there been continuous or have you had employment away from there in that interval; from 1947 down to now your work has been right there in and around the lock, has it?

A. Yes, sir, except for maybe a month at the longest.

Q. Yes, but your principal occupation has been right there.

A. Yes, sir.

Q. When you came in 1947 you came when trees were still there, did you?

A. Yes, sir.

Q. And that was prior to the time that the actual construction of the lock began, I take it.

A. Right after the contract was let.

Q. Do you recall when the locks were open to river traffic?

A. I believe February 7th.

Q. 1953?

A. 1953.

Q. And do you remember when they were dedicated?

A. I think it was in May 1953.

Q. Now, the occasion for your taking soundings as I understand it in August of 1951 was for the purpose of determining whether there was sufficient water to enable a dredge of some kind to come in, was that it?

A. Yes.

Q. Now, the water from the locks south to the mouth [fol. 142] of the river rose and fell did it, from time to time?

A. Same as the river did.

Q. And there were times, were there, when in your observation the water depth south of the lock and to the mouth of the river was shallow enough to walk across.

Mr. Moran: Pardon me just a moment. I'm objecting to the question unless he says when.

Mr. Broderick: In the year 1951, let me put it that way first.

A. I don't recall seeing it.

Q. You don't recall it being at that level.

A. In 1951, no I don't.

Q. Did you take any other soundings at any time other than August of 1951?

A. Only later in the time just prior to that. February 7th.

Q. You mean in 1953.

A. Yes, sir.

Q. And you took no soundings from August 1951 to February 1953.

A. I don't remember any.

Q. And is your recollection about the soundings that you took based upon some record that you made at the time you took them in August of 1951?

A. Yes, that's the time I can remember because they wanted to come in there to run that test for us on those bulkheads.

Q. But I say, the results of the soundings that you say you took at that time, is that your recollection about it or did you make some record to which you have referred before you testified here?

A. No, we didn't make no record.

Q. And it's your recollection now as to what your [fol. 143] soundings showed back in August of 1951, is that so?

A. I don't quite follow you.

Q. Well, you are telling the Court and jury now of soundings that you took in August of 1951, and I want to know if you made any record of those soundings at the time to which you have referred for the purpose of refreshing your recollection or whether it's just your recollection as to the thing now.

A. We recorded the soundings at the time and they were either phoned or mailed into our district office informing them there was plenty of water.

Q. There were times when the river came up and the water got high and times when it went down and got very low, isn't that true? From 1947 to and including the 5th of November of 1951?

A. Yes, from 1947 to 1951 it did get low.

Q. And there were times in that period when the water was such that the bulk of it came out of Granite City sewage system, isn't it?

A. The bulk? Well, yes, a hundred percent of the water came out of the sewer because there wasn't any sewers feeding that lower canal; it just stayed there still and any water that would flow down through the canal was water or discharge from that sewer. There wasn't any flow in the canal.

Q. I see. And I'm correct then in stating from 1947 to

and including the 5th of November of 1951 there were times when the water depth in that area that we're talking about from the locks south to the mouth of the river was such that you could walk across it.

Mr. Moran: No, he didn't say that.

Mr. Broderick: I'm asking him if that's true.
[fol. 144] Mr. Moran: You say "Am I correct in assuming that"; he didn't say that; he didn't say that.

A. I don't know.

Mr. Broderick: You don't know.

A. I wasn't down there.

Q. The duties that you had to perform there kept you around the area where the lock was being constructed generally, did it?

A. Yes, sir.

Q. And on this one particular occasion you did go out with others, I assume, and take these soundings that you have told us about.

A. Yes, sir.

Q. What is the distance from the south end of the lock down to the mouth of the river?

A. 4,000 feet.

Q. And would I be correct in saying that aside from the soundings that you took in August of 1951, you didn't have occasion to explore that area in discharging your duties at the lock?

A. In which period?

Q. From August of 1951 on.

A. No.

Q. Now, the American Bridge equipment that you say came up and got in through the south lock gate, that was there for the purpose of aiding in the completion of the construction, was it, of the lock itself?

A. Yes, sir.

Q. And was that the reason for its being there inside the lock?

A. Yes, that was a watering test.

[fol. 145] Q. So that it was there in connection with the performance of tests to determine the efficiency of the lock or whether it would work or what-not.

A. The efficiency of the bulkheads.

Q. And that was part of what was necessary in order to have these locks built, completed and accepted, is that true?

A. Yes.

Mr. Broderick: I think that's all.

Re-direct examination.

By Mr. Moran:

Q. Now, the purpose of this lock, Mr. Trojan, was to make the Mississippi River more navigable, wasn't it?

A. Yes, sir.

Q. And you had been working out there since 1947 you say.

A. Yes, sir.

Q. And from the Lock 27 if you stand on top of Lock 27, you can see the southerly mouth of that canal, can't you?

A. Part of it.

Q. You can see part of it, but from where you stand and where you see from 27 on, can you see one continuous stream of water? You understand the question?

A. No, sir.

Q. From 1947 on up through November 1951, looking south from Lock 27, could you look down that stream there known as the Chain of Rocks Canal?

A. Well, there along with my duties and along with the way they had it blocked off below the concrete structure for a period of that time, we could not see down the canal.

Q. To the best of your knowledge was there one continuous body of water between Lock 27 and the Mississippi [fol. 146] River south of Lock 27?

A. Whenever I did look I seen water.

Q. Okay; that's all a sailor can do. Would there be any water come from the upper end of the lock—when I say the upper end of the Lock 27 I mean the north end. Would there be any water come down that canal through the north gate?

Mr. Broderick: What time, please?

Mr. Moran: November of 1951, and prior thereto. Would it get up to be a 12 foot depth there inside the lock?

A. Inside the lock?

Q. Yes.

A. Roughly 40 feet of water in the lock.

Q. Where would that water from inside the lock come from?

A. It would remain still. If we had the lower valves shut, it would be water equal to the upper side of the lock. If we closed the upper valves and opened the lower valves then the water would be equal to the elevation below the lock.

Q. Was the elevation below the lock less or more than above the lock?

A. Less below the lock.

Q. Below the lock all you had to do was open this particular gate and the water below the lock going into the Mississippi River would have been much deeper.

Mr. Broderick: Object to that as leading.

[Judge Lueders: Sustained as to the form of the question.

Mr. Moran: Now, did you ever at that time, or prior thereto, were you pumping water out of the locks into the lower canal south of Lock 27 because of water coming on up—

Mr. Broderick: Object to the leading form.

[fol. 147] A. The only time we pumped water was during that bulkhead test.

Q. Now, I'm not going to identify this for the present, but I'm going to ask you if you recognize this picture. If you don't recognize it just say so. If you can tell from that picture what that is without reading any of the literature down there.

A. No, I've seen a lot of places like it, but I couldn't pinpoint where it's at.

Q. Showing you Plaintiff's Exhibit 8 do you recognize that?

A. Yes, sir.

Q. And what is that area shown in there?

A. Well, this is the lower canal here leading up to the lock structure and then directly upstream of it is the Granite City harbor and on up to the highway bridge and out into the Mississippi River again.

Q. Does this picture rather substantially portray the

condition of that lock in November of 1951 as it appears from what is evidenced in that photograph?

A. The lock looks the same there as it did in 1951.

Q. How about the bed of water between the lock and the river; does that appear the same?

A. It's more finished looking now.

Q. Is the width about the same?

A. Approximately the same width.

Mr. Moran: I'd like to re-offer it, Your Honor. He's pointed out the differences in it.

Mr. Broderick: I'd like to ask a few questions about it. In November of 1951 work was still in progress, was it not, both on the locks and on the canal?

[fol. 148] A. Yes.

Q. As a matter of fact there were at least one or more dredges that were operating south of the lock in between that place and the mouth of the river, isn't that so, Mr. Trojan?

A. I don't know; I don't remember for sure.

Q. You can't remember about that.

A. No, sir, I remember dredges in there at different times but I can't segregate the time when it was.

Q. And your notion about looking at this photograph, Plaintiff's Exhibit 8, would be that it looks about like the locks and the canal looks today, isn't that true?

A. Yes, about.

Q. And if there were pieces of equipment, that is, barges and dredges and what-not, working there in November of 1951, you wouldn't say this accurately portrays the condition as it existed at that time, would you?

A. Not accurately.

Q. And if those dredges were engaged in dredging operations for the purpose of deepening the channel or heightening the bank, however it might have been, then this photograph would not truly represent the conditions as they existed at that time, would it?

A. Just approximately.

Q. Well, I say approximately, but it wouldn't be an

accurate representation of the circumstances as they existed at that time.

A. Not accurately.

Q. Now, in response to a question Mr. Moran asked you about your ability to see from the locks.

Mr. Moran: I thought you were just going to cross-examine on the picture. I was going to ask him some more [fol. 149] questions about the picture in the event you objected to it. I handed you the exhibit and you wanted to ask him a couple of questions about it.

Mr. Broderick: You can ask him some more. I object to the exhibit for the reasons stated.

Mr. Moran: Mr. Trojan, if you excluded the questions of the dredge that was supposed to be working there on November 5, 1951, if you excluded those, does that substantially portray the topography of that area there?

A. It looks the same except—

Q. Just tell the jury what the exceptions are.

A. Since 1951 they have gone down there with equipment, dredges and land moving equipment, and trued up the banks at the water line, and also dressed the earth above the water.

A. Other than that it portrays the condition that existed in November of 1951.

A. Yes.

Mr. Moran: I would like to re-offer the exhibit.

Mr. Broderick: This shows a completed lock and the completed canal, doesn't it, Mr. Trojan?

A. It looks like that to me.

Q. It's an aerial photograph which does show that, and as a matter of fact you're not—actually dredging operations that were done south of the lock didn't begin until January 1952, isn't that correct?

A. I don't know.

Q. What was going on in November 1951 down until February of 1953 in that lower canal in the way of work, can you tell us?

[fol. 150] A. No.

Q. There was a substantial volume of work that was done, isn't that true, on that area of the canal?

A. I think there was.

Q. And in November 1951 the locks were still in the process of construction, were they not?

A. Yes.

Q. And you had this equipment that you're telling us about of the American Bridge in there working until at least December of 1951, did you not?

A. Yes.

Q. And your difficulty is trying to associate the finished product with its condition as it was in November of 1951, isn't that right?

Mr. Moran: Do you understand the question?

Mr. Broderick: Maybe you don't. In looking at that picture, it represents the finished product, doesn't it?

A. It looks like it.

Q. And the locks are finished and apparently in operation, are they not?

A. Yes.

Q. And the canal is finished, isn't it?

A. It looks like it.

Q. So that it wouldn't truly reflect the conditions of work as they were being conducted at the locks and south of there in November of 1951, would it, Mr. Trojan?

A. After 1951?

Q. No, we're trying to establish what the circumstances were, Mr. Moran is, by this picture in November of 1951, and he's asking you if this looks like it did substantially [fol. 151] in November of 1951. Now it doesn't, does it?

Mr. Moran: He said it did.

Mr. Broderick: I'm asking him.

A. With that exception, that the banks weren't trued up.

Mr. Broderick: And there is dredging operations that hadn't been done south of the lock.

Mr. Moran: Your Honor, I object to this as being repetitions.

Judge Lueders: Well, the witness hasn't responded to the question, overruled, he may inquire.

Mr. Broderick: You have the question in mind?

A. What's the question?

Q. The question is, there were from November of 1951 down until the time this picture was taken, whenever it was, there were substantial dredging operations that were conducted south of the lock and to the mouth of the Mississippi, isn't that right?

A. I don't know exactly what operations were done.

Q. I didn't say exactly, I say there were extensive dredging operations being conducted during that period of time.

A. I don't know about dredging operations.

Q. You don't remember about that.

A. All I remember is shaping up the bank.

Q. And other work that was done on the lock, is that right? That's all you can remember about?

A. Mainly at that time it was still very little concrete to be placed, mainly electrical work to be hooked up.

Q. In any event, the locks weren't open to river traffic until February 1953, isn't that right?

A. Yes.

[fol. 152] Mr. Moran: When he said the locks weren't completed, Mr. Trojan, those locks from appearances, from all outward appearances to anybody looking at them, would be the same, wouldn't they?

A. Yes.

Q. So if they weren't fully constructed, you mean some electrical work and things to be done on the inside.

A. Yes, mainly interior work to be completed, switches to be hooked up.

Q. But that wouldn't make any difference on the picture.

A. Not on the locks at all.

Q. What do they call Station 27? Are you familiar with the station?

A. Yes.

Q. What station is the south part of Lock 27?

A. We had two different stations, one for the canal and one for the lock, and station I think 75 was at the upper gate, and the lock itself was say about 1400 feet south.

Q. So that would be about 1400 feet less than 75, around

61, 62, 63. I'd like to re-offer Plaintiff's Exhibit number 8, Your Honor.

Judge Lueders: Let me ask a question of counsel, here.

(Discussion off the record.)

Judge Lueders: I'll sustain the objection at this time.

Mr. Moran: You say that a barge came through there with some to-do, some things inside the lock for the bulkheads, is that right? Brought some bulkheads in.

A. They brought the equipment there; the bulkheads were already there.

Q. They brought some equipment; what kind of equipment?

[fol. 153] A. Derrick barge and an empty barge.

Q. What is a derrick barge?

A. It's a barge with some handling equipment, hoist with a boom which could lift these bulkheads.

Q. How big a barge was that, how long, approximately?

A. It was at least 200 feet long.

Q. And how wide?

A. 35 feet I'd guess.

Q. Would you know what draft it had?

A. Empty I'd say they drew about 2 feet.

Q. And full about how much?

A. 5 or 6 feet.

Q. And how was that barge put in there; it didn't have any motive power of its own.

A. Pushed with some small push boat.

Q. Whose push boat was that?

Mr. Broderick: I object; it's immaterial.

Mr. Moran: I believe that's all.

Mr. Broderick: You say that particular piece of equipment could be floated empty in 2 feet of water?

A. Empty barges.

Q. And if they were loaded to their maximum load it would take 5 or 6 feet of water to make them float?

A. That's what they were loaded at I would guess.

Q. A while ago in response to a question asked you by Mr. Moran, and you undertook to tell him you weren't able

to see, as I understood it, from Lock 27 south to the mouth of the Mississippi River, is that right?

A. There was a period of time that they had this plug, they called it, across the canal just downstream of the lock, [fol. 154] very close to the wall.

Q. When was that in there?

A. When the lock was under construction.

Q. Was it there on the 5th of November 1951?

A. No.

Q. When was it taken out?

A. I don't remember the date; I can't recall what time they took it out.

Q. Aside from this plug being there you could then have stood on the lock and looked all the way from the mouth of the Mississippi from the canal——

A. You could see; there's a curve in the canal and you can't see the full mouth because it curves around out of sight; you can see a part of it.

Mr. Broderick: That's all.

Mr. Moran: You can't see around a curve, can you?

A. I can't.

Q. But you can see where the river started around the curve.

A. Yes, sir.

Mr. Moran: That's all.

DALE SKEEN, having been duly sworn, testified on behalf of Plaintiff as follows:

Direct examination.

By Mr. Moran:

Q. Will you tell the Court and jury your name, sir.

A. Dale Skeen.

Q. And what is your business or occupation?

A. I'm a construction labor foreman in charge of receiving equipment and what have you, for Austin Com-

[fol. 155] pany at the Dow plant.

Q. And where do you live, sir?

A. 1709 Mitchell, Granite City.

Q. Were you ever employed on the Chain of Rocks Canal?

A. I was employed by the River Construction Company on the locks job, yes sir.

Q. And about what dates did you work there for the River Construction Company?

A. I started there I believe the first part of 1948 and left there the first part of 1951; I think it was March of 1951.

Q. Now, from the time in 1948 do you know where Lock 27 is, sir?

A. Yes, sir.

Q. And if I say an area south of Lock 27 in the canal itself do you know what I'm talking about?

A. That's right.

Q. And from Lock 27 south to the river is that what they call old Gabaret Shoot?

A. We call it the slough. I guess they call it the shoot, too.

Q. You are familiar with that area.

A. Yes, sir.

Q. And do you know where that area ran from the river to the river?

A. That's right.

Q. And have you been up and down that place before?

A. Through the years, yes.

Q. Did you ever swim out there?

A. Yes.

Q. Did you ever fish out there?

A. Yes.

[fol. 156] Q. Did you ever run a motor boat out there?

A. No, sir.

Q. Did you ever row a boat out there?

A. I rowed a boat out there.

Q. When did you do that, sir?

A. You mean fish out there?

Q. Yes.

A. Years before the locks was there.

Q. How deep was that water there, if you know, years before the locks?

A. Oh, spots there I guess 12, 14 foot deep.

Q. Did people swim there?

A. Yes.

Q. Did people drown there?

A. Yes, they've drowned there.

Q. How was the current there?

Mr. Broderick: Let's get the time fixed.

A. Well, that would be hard for me to say; at certain times it was swift and other times it wasn't. I wouldn't know how to define that.

Mr. Moran: Well, 12 or 15 years ago you had been out there when the current was swift.

A. Yes, I have.

Q. South of Lock 27 does that follow old Gabaret Shoot?

A. I always considered that to be Gabaret Slough, yes, the lower end of it where it emptied into the river.

Q. And from the time you worked out there did you ever work on a lock job out there for anybody other than River Construction Company?

A. No.

[fol. 157] Q. What was your job with River Construction Company?

A. I had charge of the store room and ordering supplies and equipment and also had men work under me there the same as I do on this job.

Q. And you say you left there in February of 1951.

A. Either February or March, first part of March.

Q. When you were out there, say in 1951, this canal, did this canal run south from the locks all the way to the river?

A. Yes, sir.

Q. Was that one continuous body of water?

A. Any time I ever seen it it was.

Q. Did you ever walk across it?

A. No, I never tried that.

Q. Now, did you ever see, sir, in November of 1951, did you ever have any occasion to bring any equipment or supplies in from the river up to the

A. November of 1951, I wasn't there.

Q. Prior to 1951.

A. Yes, we did.

Q. What was that, sir?

A. Well, we dismantled a concrete plant there and the silos and other various pieces of equipment, and shipped them by barge away from there.

Q. When they went away from there, tell the Court and jury how they went away.

A. On barges.

Q. What stream of water?

A. Well, that was the slough, as I call it, below the locks.

Q. The Chain of Rocks Canal?

[fol. 158] A. It is now.

Q. When it got down to that curve, where did it go?

A. Into the river.

Q. And is the same water in the canal as in the Mississippi River?

Mr. Broderick: I object to the leading form of the question; the witness can testify.

Judge Lueders: All right, sustained.

Mr. Moran: Now, 12 or 15 years ago was Gabaret Island an island?

A. Yes.

Q. Was it completely surrounded by water?

A. Yes, I guess it was; it was a slough on this side.

Q. Was that waters of the Mississippi?

A. Yes, sir.

Q. Was there a loading dock or anything like that?

A. There was a dock built there.

Q. When was that?

A. That was built before I went there even; they tell me in 1947—

Mr. Broderick: Wait a minute!

Mr. Moran: Was the dock there when you got there?

A. Yes, there was a dock.

Q. What was that loading dock for, if you know?

A. I don't know what it was originally put there for because I wasn't there.

Q. When—was there anything else you shipped in and out of there, sir?

A. Well, nothing but equipment; that is by boat you mean?

[fol. 159] Q. By boat.

A. No, nothing but equipment is all.

Q. Was that water always deep enough to get out?

A. Presume it was; I never heard any kick. They brought the barges up.

Q. You were in charge of the equipment or supplies that went out, weren't you?

A. Certain amount of it; some of it was in charge of an engineer.

Mr. Moran: That's all.

Cross-examination.

By Mr. Broderick:

Q. Mr. Skeen, you say you are now labor foreman for Austin Company.

A. That's right.

Q. Are you a member of the laborers' union?

A. Yes, sir.

Q. How long have you been a member of that organization?

A. Twenty years or better.

Q. You're acquainted then, I take it, with Jacob Senko, the plaintiff in this case?

A. No, I'm not personally acquainted with him.

Q. Were you subpoenaed to come here as a witness?

A. By Mr. Moran, yes sir.

Q. And you started to work for Austin Company up around the lock 27 about when?

A. It was the first part of 1948; I believe it was on New Year's Day.

[fol. 160] Mr. Moran: Pardon me just a moment. I think the question you said "you started to work for Austin Company on the locks"; I don't think you meant that. You mean the River Construction Company.

Mr. Broderick: You're working for Austin Company now.

A. Yes, sir.

Q. How long have you worked for them?

A. Ever since I left the lock job in March of 1951.

Q. You weren't there in November of 1951, I take it.

A. No sir.

Q. And what the conditions may have been from March of 1951 to November, you would have no way of knowing about that.

A. No sir, I wouldn't.

Q. When you left there the locks hadn't been completed, had they?

A. No, they weren't completed.

Q. There hadn't been any traffic through the locks at the time you left.

A. There were boats in there and they had tried them. I don't know if you'd call it traffic, but they had boats in there, small vessels that the government had, test boats in there.

Q. You have been familiar with this slough, as you call it, for 15 years or more, have you?

A. Oh, I'd say longer than that. I lived in Granite City about 35 or 40 years.

Q. And you have been familiar with that slough all of that time.

A. Yes, I have.

Q. And you were up there in a row boat at one time or another.

A. Lots of times.

[fol. 161] Q. You never saw any excursion boat come through that slough, did you?

A. No, I never.

Q. You didn't see any river tows come down through there, did you?

A. No, I don't recall ever seeing a river tow try the slough.

Q. As a matter of fact there may have been places you say that were 12 or 14 feet deep in this area in the years that you have been acquainted with it, and there are other places that wouldn't be nearly that deep, isn't that true?

A. I just made a guess when I said 12 or 14.

Q. But I say there are other areas that were very shallow.

A. There's some shallower than that, sure.

Q. And there wasn't any river traffic going through there at any time that you know about.

A. I don't recall it, no.

Q. In other words, although this was a stream that was used for fishing and swimming and row boats of the kind you are telling us about, it wasn't used or adaptable for river traffic in the years you have been familiar with it.

Mr. Moran: Now just a moment! Did he say "adaptable"? I object to that question.

Mr. Broderick: That is probably improper. What I'm saying is while it may have been used as you say for swimming and fishing and row boats, it wasn't used by large vessels that were engaged in traffic on the river.

Mr. Moran: If you know.

A. No, now I never seen no barge tows come through there, if that's what you mean, excursions.

[fol. 162] Q. No battleships.

A. No.

Q. Well, it wasn't used for river commerce or traffic, was it? That's the point I'm asking you.

A. No, I don't suppose it was.

Mr. Broderick: I think that's all, Mr. Skeen.

Mr. Moran: That's all.

CLIFFORD STEVENS, having been first duly sworn, testified on behalf of Plaintiff as follows:

Direct examination.

By Mr. Moran:

Q. State your name, please.

A. Clifford Stevens.

Q. And where do you live, Mr. Stevens?

A. 2115 Illinois Avenue, Granite City.

Q. In West Granite?

A. West Granite.

Q. West Granite is the closest part of Granite City to the Chain of Rocks Canal, is that correct?

A. That's right.

Q. Now, what is your business or occupation, Mr. Stevens?

A. I'm a laborer.

Q. And did you ever work on the Chain of Rocks Canal job out there?

A. For River Construction I did.

[fol. 163] Q. When did you start there?

A. 1947.

Q. And when did you leave there, approximately?

A. Well, the first part of 1951.

Q. Now, before I get into that, are you familiar with an area known as Gabaret Shoot or Chatteau Slough?

A. I am.

Q. And just in your own words could you describe to the jury about where in the river that shoot came in and where it came out, if it did come out.

A. You mean the old slough? I could on the photo I think there, yes.

Q. Just sit down a minute while I qualify it. Now, I show you an area south—I point my finger to Lock 27 and go south down to the mouth of the canal of the river; can you tell me what area that is or was?

Mr. Broderick: You're looking at Plaintiff's Exhibit 8?

Mr. Moran: That's right, that's old Gabaret Shoot.

A. Up until this point here, that's north of the lock.

Q. You're indicating a point there and I wonder if you would take that pencil and stick that where you indicate that ends there.

A. Right approximately here (indicating).

Q. Now, would you also take your pencil and indicate where old Gabaret Slough or shoot goes into the river on the other end, on the north end.

A. Yes, sir.

Q. Is that close to some water works or something?

A. Yes, the old water works.

Q. Now, this area up beyond this and continuing north, what is that?

[fol. 164] A. Well, that's the new canal.

Q. And is that completely newly dredged out, sir?

A. That's right.

Q. Now, this area from here and coming down to the canal, is that the path of old Gabaret Shoot, sir?

A. Approximately, yes sir.

Q. How long have you been familiar with old Gabaret Shoot?

A. Thirty-five years.

Q. Did you ever swim there?

A. Yes, sir.

Q. Did you ever fish there?

A. Yes, I have.

Q. Did you ever operate a boat there?

A. I don't know if I had operated one; I've rowed one there.

Q. We'll call that operating, and during that particular time would you be familiar with the depth of the water? Swimming you would know how deep it would get, wouldn't you?

A. The water varied. I've known it to be I'd judge 20 feet deep there.

Mr. Broderick: Where, Mr. Stevens?

A. In the old channel.

Mr. Moran: And would that water have anything to do when the Mississippi water rose and fell; would that water do anything?

A. It did, it was governed by the Mississippi.

Q. And was the water that came from Gabaret Shoot and went down to the river, was that all coming from the river?

Mr. Broderick: I object to that as leading and suggestive.

Judge Lueders: Yes, sustained.

Mr. Moran: You have followed that canal all the way down, haven't you, that shoot?

[fol. 165] A. Yes.

Q. State what water went through that shoot.

A. That was water from the Mississippi.

Q. Was Gabaret Island, sir, completely surrounded by water?

A. At times it was, yes.

Q. And when it was surrounded by water, what water was that that surrounded Gabaret Island?

A. Water from the Mississippi.

Q. State what the current was in that Gabaret Shoot or Slough.

Mr. Broderick: Any particular time?

Mr. Moran: When you used to swim there and fish there.

A. Well, I've seen times it wasn't safe to swim in the current was so strong.

Mr. Broderick: I object to that as not responsive.

Judge Lueders: Sustained.

Mr. Moran: Well, some times of the year would it be swift?

A. Oh yes.

Q. And some times of the year not so swift.

A. That's right.

Q. And now, you said you went to work for the River Construction Company when, about 1947 you say?

A. 1947.

Q. And when you went there did you have any particular thing that you did? Was there any particular project that you took charge of?

A. Well, yes, about the first thing I did was build a loading dock.

Q. A loading dock. Where was that loading dock?

A. Well, I would judge about 400 yards below the locks. I could be wrong on that a little.

[fol. 166] Q. Was it between the locks and the mouth of the canal?

A. Oh yes.

Q. And which side of the bank was it on?

A. On the east side, I suppose you'd call it.

Q. And showing you Plaintiff's Exhibit 8 again, could you indicate on there where the loading dock was with your pencil.

A. Well, it's approximately—

Q. Is that the stream there (indicating)?

A. This is the stream here, yes; it's approximately here (indicating).

Q. All right, did you have charge of that loading dock job?

A. I did.

Q. And how big a loading dock was that?

A. Oh, I would say it was 50 or 60 wood piling drove there.

Q. What was the purpose of those pilings being driven?

A. To unload sheet piling to drive around the side of the dock.

Q. Did any vessels or anything come in from the south mouth of the canal?

A. They did.

Q. About how many, Mr. Stevens?

A. Well, that I don't know for sure; I would say half a dozen barges.

Q. And what did they bring in?

A. Sheet piling.

Q. Were there any worleys shipped out, load any worleys or unload any?

A. There was worleys loaded there but not unloaded.

Q. When they loaded them, what did they do?

A. Took them on the river.

Q. How did they take them out?

[fol. 167] A. By tug.

Q. A tug boat would take the worleys out.

A. Yes.

Q. Whose tug was it, if you know?

A. I don't know.

Q. About when was that; prior to 1951?

A. Yes, in the late 1950's, I believe.

Q. Now, then, from looking from the southerly portion of Lock 27 all the way, could you see a body of water all the way to the river?

A. Yes, sir.

Mr. Broderick: From where?

Mr. Moran: From the southerly section of Lock 27. Now Mr. Stevens, state whether or not there was any water

that came into that southerly section of the portion south of Lock 27 other than from the sewer.

A. Yes, there was always water came in there.

Q. Where did it come from?

A. Came from the lock proper, inside the lock.

Q. How did it get from the lock proper into the southerly end of the canal there?

A. It was pumped in there.

Q. How many pumps were there?

A. I believe there was three big electric pumps, 15 inch lines discharge.

Q. What was the purpose of pumping out this lock?

A. To keep it dry so we could work.

Q. And then was there any vessels tied up to this piling that you built there, barges or anything?

[fol. 168] A. Oh yes, the barges were that the sheet piling were on.

Mr. Moran: I believe that's all. I would like to re-offer Plaintiff's Exhibit 8, Your Honor.

(Discussion off the record.)

Judge Leuders: Objection sustained as to the offer of Plaintiff's Exhibit 8.

Cross-examination.

By Mr. Broderick:

Q. Let's see, how old a gentleman are you, please?

A. Forty-nine.

Q. Have you been familiar with the slough out there have you for a good many years?

A. That's right.

Q. About how many did you say?

A. I'd say about 35 years approximately.

Q. You are a laborer; did I understand you to say that is your occupation?

A. That's my occupation.

Q. Do you belong to the local here in Granite City?

A. Yes, sir.

Q. Do you know Mr. Senko?

A. No, I don't.

Q. I suppose you have become acquainted with him since this suit has been on trial, have you?

A. No, I have never met him.

Q. Now, you started for the River Construction Company in 1947, did you?

A. That's right.

[fol. 169] Q. And worked as a laborer some place up around where the locks are now located.

A. I was a labor foreman.

Q. And the work that you did up there when you first started was what kind of work?

A. Labor work.

Q. What did you do?

A. Well, along about the first thing we did, we put in what they call an overflow line and built this dock practically the same operation.

Q. What is the overflow line you're talking about?

A. Well, that was in case the river would come up and would get so high at the south end this freight would break in and wash the dirt back. They could open them locks and let the water in place of breaking the levee.

Q. Do you know where the old water works were?

A. Yes, sir.

Q. When you went in in 1947 there was a roadway across this slough over to the old water works, wasn't there?

A. A dike.

Q. It was used as a roadway to get in and out of the water works.

A. Yes, sir.

Q. Do you know how long that stayed there?

A. No, I don't.

Q. Do you know in 1947 how long it had been there?

A. No, I couldn't tell you how long.

Q. If I said a good many years, would that be a general characterization?

A. Not too many years I would say.

[fol. 170] Q. As much as five?

A. It possibly had been there that much.

Q. That was a dike or roadway that extended—

Mr. Moran: I'm going to object to the choice of words. A dike is not a roadway and a roadway is not a dike. I would like to have you define what it is *your* asking the witness, whether it's a roadway or dike.

Mr. Broderick: Well, let's let the witness tell what it was. What was it?

A. I would say it was a dike and that it was built in such a way that water wouldn't affect it and there was several times you couldn't cross it. I've seen time after time it couldn't be crossed.

Q. I'll disclaim that as not responsive and ask it be stricken. Mr. Moran wants to know what you call it and do you call it a dike?

A. I would call it a dike or levee; it was built out of slag, something that water wouldn't move.

Q. And when cars went from the old water works out, did they go across this dike?

A. They did, yes, sir.

Q. And it was used for roadway purposes, was it?

A. Yes, it was used when it could be used.

Q. And it was built across this slough that we're talking about as Gabaret Slough, wasn't it?

A. That's right.

Q. And in 1947 in your judgment it had been there at least 5 years, hadn't it?

A. Well, approximately five years maybe.

Q. You have been familiar with that slough for 35 years.

A. That's right.

[fol. 171] Q. And you say that you have ridden around in boats on it.

A. I have.

Q. Those were row boats, were they?

A. Yes, sir.

Q. And you swam and fished, I believe you said; in this area of the slough.

A. That's right.

Q. How long is that slough or was it, approximately?

A. Well, from what points are you talking of now?

Q. Well, from where it came in and went out the river in the way you have described in your direct examination.

A. That I don't know. I would judge three or four miles.

Q. And I'll ask you to state, if it isn't a fact in those three or four miles there were areas where even a row boat couldn't travel in the years you have been acquainted with it.

A. That's possible, yes.

Q. And when you say it's possible, that is your best judgment now in thinking about it, isn't that what you mean?

A. That's right.

Q. And you didn't see at any time before 1947 any river traffic, that is, boats or barges or that kind of equipment coming down through that shoot, did you?

A. Not large ones, no.

Q. Boats that you saw were the row boats in which you rode, is that right?

A. Yes.

Q. Now, you left the River Construction Company and the lock job in the first part of 1951, did you?

A. That's right.

[fol. 172]. Q. And did you work up there with Mr. Skeen?

A. I did.

Q. You and he left about the same time.

A. I left before he did.

Q. So what the circumstances were around there from the early part of 1951 you wouldn't know about now.

A. The early part?

Q. That's when you left, wasn't it?

A. After that I don't know too much about it.

Q. Now, when the river came up you say the water in this slough got higher and when it went down it got lower, is that right?

A. That's right.

Q. But there was the affluent from the Granite City sewage system that emptied into this slough, isn't that true?

A. Yes.

Q. And prior to 1951 had been going on for a good many years, hadn't it?

A. Yes, the slough was also fed by other water besides

the Mississippi. I suppose there was springs in it; it always had water.

Q. You say it always had water?

A. Oh yes.

Mr. Broderick: Do you want to ask him anything else?

Mr. Moran: I just want to get the answer; I didn't hear it.

Mr. Broderick: And there were times I get it then when the water was low in this slough even in the areas—

A. So was the Mississippi.

Mr. Broderick: All right, that's all.

Redirect examination.

Mr. Moran: When the Mississippi would be low, the [fol. 173] slough would be low, is that correct?

A. That's correct.

Q. When the Mississippi would be high, the slough would be high.

A. That's correct.

Q. And did you ever have any trouble getting from one end of that in a row boat—

Mr. Broderick: I object to that as leading and suggestive. Judge Lueders: Sustained.

Mr. Moran: Did you ever row a boat up and down there?

A. Yes.

Q. Did you ever have any places you couldn't get by in a boat?

A. Not when I was in the boat, no.

Q. Did you ever see motor boats going up and down there?

A. Yes.

Q. Quite a few of them?

Mr. Broderick: I object to that as leading and suggestive; if Mr. Moran wants to testify—

Judge Lueders: Sustained.

Mr. Moran: Did you ever see any other small craft other than row boats there?

A. Well, no, not that I can recall.

Q. Now, you know what a ferry is.

A. Yes, sir.

Q. What is the purpose of a ferry, if you know?

A. Transport the traffic from one side to the other of the stream.

Q. And he asked you about a dike there. Did you ever know or see a ferry that went across, back and forth across that slough?

[fol. 174] A. Yes, sir.

Q. How long ago was that, sir?

A. That I don't remember.

Q. Was it more than ten years ago, more than 15 years ago?

A. No, it wasn't more than that; I would say in the last 10 years.

Q. And what was the purpose of that ferry; would they haul anything in it?

A. Yes.

Q. What would they haul?

A. The farmers' products back and forth on the island.

Q. Now, you said that dike was built in such a way water wouldn't affect it; what do you mean?

A. There was times the water would get so deep over it and the current would come through there that it would have been impossible to build a dike unless they'd built it high enough.

Q. When the water got over the dike is when the river was high.

A. Yes.

Q. How did they get back and forth across the stream?

A. After the freight was disbanded, they didn't get back and forth.

Q. Had to wait?

A. Yes.

Q. Was there any electric lights on Gabaret Island?

Mr. Broderick: I object to that as immaterial.

A. Not to my knowledge.

Judge Lueders: Well, sustained.

Mr. Moran: Now, this overflow pipe or something you

said that you built when you first went on that job up on the lock 27, what would you say the purpose of that was?

[fol. 175] A. The purpose of that was if we built an overflow pipe, it was a 5 foot pipe, tile, and we put a valve in it right about I would say the center of the levee, some of them calls it a plug, and when the river got so high if they got to doubting that plug holding, we'd go in and open this valve and let the water in the locks in preference to letting it go over and wash the sand and everything that had been pumped out to rock bottom.

Q. Now, this 5 foot hole in there was for——

Mr. Broderick: Wait just a minute!

Mr. Moran: Well he said he built a 5 foot overflow plug.

A. It was a 5 foot pipe went through the plug, one end was inside the locks and one end was outside the plug.

Mr. Moran: That pipe had a hole in it if you opened it.

A. When it opened the valve it was open; there was a valve that kept it closed.

Q. When you opened it the water would flow back into the lock:

A. Yes.

Q. How high was that did you say?

A. Was what?

Q. The plug.

A. Well, I would say——

Q. The valve, the overflow pipe.

A. The overflow pipe was possibly halfway of the plug.

Q. Do you know about how high the plug was in your estimation?

A. The plug? The walls are 90 feet I believe, 90-some feet and the valve was as high as the wall was in case of high water you could get out there and open it and let the water in.

Mr. Moran: I believe that's all.

Mr. Broderick: Did you ever see the overflow pipe operate, Mr. Stevens?

[fol. 176] A. No, I don't recall ever seeing it; they threatened two or three times but if it was, I don't remember.

Q. Now, this plug that you're talking about, what is that?

A. That's the dike at the end of the locks.

Q. And you say that on the inside of the locks it was about 90 feet from the top down to the bottom?

A. The top of the locks; I could be wrong on that but the walls are 90 feet high.

Q. And that was an excavation made there as you say after River Construction began to work in 1947, is that right?

A. That's right.

Q. They made that kind of a hole and then built these concrete walls or sides on the locks, is that right?

A. That's right.

Q. And you were helping with that kind of work as it went along as a labor foreman, were you?

A. That's right.

Q. Now, this ferry that you say was out there some ten years or more ago, where was that located, this ferry?

A. Well, I would say some two or three hundred feet below where the dike was, the crossing.

Q. You mean the crossing to the water works?

A. The crossing to the old water works, West 20th Street we call it.

Q. And this was below that you say.

A. Yes, some below it, two or three hundred feet.

Q. How wide was this area of water where the ferry operated?

A. Well, I would say it was two or three hundred feet; of course it varied with the water.

Q. And this was some kind of a boat kept there and used by the farmers, is that right, getting back and forth at that [fols. 177-211] place on the slough?

A. That's right.

Q. That hasn't been operated for ten years, is that what I understand your testimony to be?

A. Well, somewhere in that neighborhood; I can't remember the dates on that.

Q. Was the operation continued after the dike was built?

A. No.

Mr. Broderick: I think that's all.

Mr. Moran: That's all.

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[fols. 212-216] A. M. THOMPSON, JR., having been previously sworn, testified as follows:

Cross-examination.

By Mr. Moran:

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[fol. 217] Mr. Moran: Mr. Thompson, on the 5th day of November 1951, the James Wilkinson had certain people whose duties it were to carry on the function of the dredge, is that correct?

A. That's correct.

Q. And what was the normal number of persons who carried on the function of that dredge? Were there four, five, three, two or one or what?

A. Just a minute; there were four, sir.

Q. Now, there was a pumper, is that right, what you call them?

A. Yes, sir, that's close enough, operator.

Q. Operator, all right; he operated the dredge.

A. Yes, sir.

Q. An then there's an oiler or something like that, is that right?

A. Yes, sir.

Q. I guess he oils the machinery and keeps the machinery up, is that correct?

[fol. 218] A. Yes, sir.

Q. And then what other is there?

A. An engineer.

Q. What does the engineer do?

A. Runs the engines.

Q. Now, all the miscellaneous work that is not done by the oiler, the engineer or what other one?

A. Operator.

Q. All of the other work there is done by another person, isn't it?

A. Yes, sir.

Q. All work but the engine work and the actual operation of the machinery is done by somebody else.

A. Yes, sir.

Q. And what is that person?

A. He's a laborer.

Q. He's a laborer aboard a dredge, is that correct, sir?

A. Yes, sir.

Q. He wears a life jacket when he goes ashore, is that correct sir? He's supposed to, isn't he?

A. Yes, sir.

Q. And that is orders from your company, isn't it?

A. Yes, sir.

Q. And that is the orders from the government about keeping the men on a dredge, isn't it, sir?

A. Yes, sir.

Q. So if I call him a deckhand I wouldn't be too far wrong, would I?

Mr. Broderick: I doubt whether that's a proper question. [fol. 219] Mr. Moran: May he answer it, Your Honor?

Judge Lueders: Well, I think the form of the question is objectionable; sustained.

Mr. Moran: Does he do the work of a deckhand?

A. Sir, I am not familiar with the work of a deckhand on a tow boat or whatever they are on the river.

Q. You know what a deckhand does, don't you?

A. No, sir, I know nothing about river work other than dredging operations.

Q. You dredge in the river, don't you?

A. Yes, sir.

Q. And this earth that you move comes from the bed of the navigable water, doesn't it?

Mr. Broderick: Wait a minute! I object to that.

Mr. Moran: Doesn't it come from a water?

A. Comes from water, yes, sir.

Q. The bottom of the water, and I don't believe you put life jackets on those fellows that work ashore, do you?

A. No, sir.

Q. Now, on that particular date, November 5, 1951, LaCrosse Dredging Company had a shack or a labor shelter or something on the east bank of the canal, is that correct?

A. Yes, sir.

Q. And that shack or shed or labor shelter was for the use of the employees of the LaCrosse Dredging Corporation.

A. That's correct, sir.

Q. And in that shed was a stove, is that correct, sir?

A. Yes, sir.

Q. And that stove, I presume, was used for heating.

[fol. 220] A. Yes, sir.

Q. Especially in the wintertime.

A. Yes, sir.

Q. And the only people who had a right to be in that shack or shed or laborers shelter were employees of the LaCrosse Dredging Corporation, is that correct?

A. No, sir, I don't believe it is.

Q. What other people had a right to be there?

A. Anyone that was in the area; if they were cold the door was——

Q. I'm asking you who had the right to be in there, not who had gone in there.

Mr. Broderick: I think that is objectionable as to who had the right.

Mr. Moran: I don't believe so, Your Honor. I have some cases to sustain me on that.

Mr. Broderick: Who did or could might be one thing, but who had the right might be a conclusion that this jury might be required——

Judge Lueders: Read the question back, please.

Mr. Moran: I'll repeat the question. No other person other than an employee of LaCrosse Dredging Corporation, Mr. Thompson, had a right to be there. In other words, if any person other than a LaCrosse Dredging employee was in that shack or shed or shelter, whatever you call it, any supervisor of LaCrosse Dredging Corporation could have told them to leave that shack or shelter, isn't that correct.

Mr. Broderick: I object to that as argumentative, speculative, and calling for the conclusion of that witness that

the jury may have to determine as the ultimate [fol. 221] fact.

Judge Lueders: Well, I think you may inquire as to who did use it; when you use the word "right"—

(Discussion off the record.)

Judge Lueders: Objection sustained.

Mr. Moran: Now, what do you call this? A shed, or shack or laborer shelter, what do you term it?

A. Shelter.

Q. A shelter, and the shelter's got walls on it, is that correct.

A. Yes, sir.

Q. And it's got a roof on it.

A. Yes, sir.

Q. And a stove pipe going out of it.

A. That's correct, sir.

Q. And isn't a shelter usually something without any walls on it?

A. In my terminology, no, sir.

Q. You call it a shelter then. Now, this shelter was on some skids, is that correct?

A. That's correct.

Q. And as you progressed up or down you would move that shelter by the use of some moving equipment that you had ashore, is that right?

A. Yes, sir.

Q. And the equipment that you used to move it with would be LaCrosse Dredging Company equipment, is that true, sir?

A. Yes, sir.

Q. And it would be moved over by LaCrosse Dredging Company employees, is that true, sir?

[fol. 222] A. Yes, sir.

Q. And the shack was maintained for the exclusive benefit of the LaCrosse Dredging Company and its employees, is that correct sir? You didn't maintain that shack out there for somebody else to use, did you, sir?

A. No, sir, that's correct.

Q. It was for your benefit, exclusive benefit then, wasn't it?

A. Yes, sir.

Mr. Broderick: I object to that.

Judge Lueders: Overruled, it may stand.

Mr. Moran: Did you sir, those members of the crew of this dredge, take soundings while they were out there?

Mr. Broderick: I don't believe that the "members of the crew" would be a proper characterization if it's not intended to have any legal significance, but if it does, I don't believe it would be proper.

Mr. Moran: Did the complement that you have aboard that dredge, did they take soundings from time to time to see how deep you were going?

A. No, sir.

Q. Never took any soundings.

A. Not to my knowledge, sir.

Q. Who did?

A. We had an engineering crew.

Q. Wasn't one of those aboard there an engineer?

A. No, a civil engineers.

Q. Oh, I'm sorry, and a civil engineer is the one that took the soundings.

A. That's correct.

Q. And you say no one aboard that dredge took soundings at your direction.

[fols. 223-232] A. Not at my direction, sir.

Q. At the company's direction?

A. No, sir.

Q. All right.

A. Not to my knowledge.

Mr. Moran: I believe that's all, sir.

[fol. 233] ALBERT BECKMAN, having been duly sworn, testified on behalf of Plaintiff as follows:

Direct examination.

By Mr. Moran:

Q. Your name is Pat Beckman.

A. Albert Beckman, by rights; that's my nickname.

Q. And you live at Rural Route #1, Granite City, Illinois, is that correct?

A. That's right.

Q. And what is your business or occupation?

A. Farming.

Q. And how large a farm do you operate now?

A. Just 80 acres.

Q. 80 acres, is that correct?

A. That's right.

Q. Now, with reference to Gabaret Shoot, do you know where that is?

A. Gabaret Slough.

Q. Do you know where Gabaret Shoot or Slough, the course that it ran prior to the time that the Chain of Rocks Canal was constructed?

A. Yes, I do.

Q. And had you had occasion to be on that particular body of water prior to the time that the Army Engineers did some construction work there?

A. No, I have never been on it since they put the canal—

Q. Before that.

A. Oh yes, before that lots of times.

[fol. 234] Q. Did you ever fish there, Pat?

A. We used to go fishing and swimming, too.

Q. Did you ever hunt there?

A. Hunting.

Q. And state whether or not prior to the time that the Army Engineers came in there to go to work, whether or not that was used by the public prior to the time that the Army—

A. Boats went through it when the river was up.

Q. Was it used by the public?

A. Yes, motor boats from St. Louis and around.

Q. Did you ever hear of a boat the "Spreading Eagle"?

A. My father said it went through a couple times years ago.

Mr. Broderick: Wait just a minute!

Mr. Moran: I'll qualify this a little further.

Mr. Broderick: I move to strike the answer.

Judge Lueders: Motion allowed

Mr. Moran: Now Mr. Beckman, how long has your father passed away?

A. Since 1935.

Q. And that would be approximately 19 or 20 years ago.

A. Yes.

Q. And how long have you lived in that area?

A. I've been there all my life except three years I was here in town, three years.

Q. That would be 56 years you have lived there.

A. That's right.

Q. Has your farm ever been close to Gabaret Shoot?

A. Until Pa sold part of it in 1923, and I rented it in 1926 and farmed it until 1942.

Q. How close was it?

A. Up to the slough.

[fol. 235] Q. Right up to the bank?

A. All the way up to it.

Q. Where does that water—or where did that water come from that went into that slough?

A. From out of the river and went back in.

Q. Was there—what river was that?

A. Mississippi.

Q. And now, did you know where Gabaret Island is?

A. Yes, I know where it is.

Q. What water, if any, surrounded Gabaret Island?

A. Water out of the Mississippi when it come through Gabaret.

Q. Now, do you ever remember where a ferry company that brought any mules off Gabaret Island?

A. The Alton ferry brought the mules off Gabaret in time of high water.

Q. How long ago was that?

A. I can't tell you what year it was, around '22; my brothers helped load and unload them.

Q. Did you ever have any occasion to have any live-stock go into that shoot or slough?

A. I got a pair of mules in it.

Q. You drowned a pair of mules in it, how long ago was that?

A. I can't tell you.

Q. Was it 20 years ago?

A. No, it ain't that long yet; must have been along about 1928 I guess, something like that; I don't remember just the year exactly no more.

Q. Now, did they ever—do you know where the water works is?

A. Yes.

[fol. 236] Q. Was there ever any traffic between the easterly bank of Gabaret Shoot or Gabaret Slough and the water works over there?

Mr. Broderick: I think we ought to get the time fixed; the questions are leading.

Judge Lueders: Yes, sustained.

Mr. Moran: Do you know of any traffic ever being on there prior to the time the Army Engineers went on there?

A. They used to haul coal with teams and wagons. When the river got high and they got short on coal, they had a barge they made that a took around 75 bushel- of coal with a motor boat and took it up there. I rode on that many a time.

Q. Now, did you ever—has there been any farmers on Gabaret Island?

A. That's right.

Q. Did they ever ship any supplies on or off Gabaret Island, if you know, prior to the time the United States Army Engineers went in there to work?

A. They used to bring the mules and stuff over there with a barge every time they got caught with them over there.

Q. Now, was there ever a ferry operated there?

A. Yes, there was a ferry.

Q. Where was that at?

A. That was just below 19th Street as you go out.

Q. Would that ferry be south or north of Lock 27? Do you know where Lock 27 is?

A. That's the locks below here.

Q. Is that south or north of it?

A. North of it.

Q. What was the purpose of that ferry being there?

[fol. 237] A. That's where they crossed—Niedringhaus company crossed with the farm, and the water company

took coal over to the water works; they used to haul coal over there with four teams and times they had a barge in there, four teams and wagons was on the barge at one time.

Q. How long ago was it that you talked to your father about this Spreading Eagle?

A. That's a long time back.

Mr. Broderick: Wait! I don't think that type of conversation would be admissible.

Judge Lueders: Yes, sustained.

Mr. Moran: It's preliminary, because I'm going to prove it as a historical fact. I know it's hearsay but some things when they get that old you've got to prove them by, and that's the reason I was getting into that.

Mr. Broderick: I would object to that, if Your Honor please; it wouldn't be proper proof.

Judge Lueders: I don't believe that would be proper. I'll sustain the objection.

Mr. Moran: Okay. You may cross examine.

Cross-examination.

By Mr. Broderick:

Q. Mr. Beckman, is your property or farm north or south of the lock?

A. North.

Q. And on which side of the Gabaret—

A. On this side.

Q. "This side" would be east.

A. Uh-huh.

Q. And you say you have fished and hunted and swam in that slough for a good many years, is that [fol. 238] right?

A. That's right.

Q. And at times when the river came up and the water got high, if there were any mules or livestock on Gabaret Island, why they'd get some kind of conveyance to get them off of that island, is that right?

A. They took that all the way over to the place and loaded them over there.

Q. Over where?

A. Took it over to the farm house and loaded them there.

Q. To your farm house?

A. No, to the company's on the island.

Q. On the island?

A. Yes.

Q. And that would be when the river was in flood stage, would it?

A. When the river was up enough to go over the bank they couldn't come off on this side.

Q. And that same situation was true I guess so far as the 75 bushels of coal that you talked about that were pulled around by motor boat.

A. That's right.

Q. That was done when the river was in flood stage.

A. That's right.

Mr. Moran: I object to that. He never said anything about flood stage. He said when the river was high, and you said flood stage. I'm objecting to it, Your Honor, unless he explains what he means by flood stage.

Judge Lueders: Well overruled, he may cross-examine [fol. 239] him. Do you understand the question?

A. Yes, he means when it was up to flood stage. The company used to quit operating their ferry on 28 feet.

Mr. Broderick: That was flood stage?

A. No, 30 was flood stage.

Q. The river came out of its banks and that was the time those barges were used and this motor boat to pull the 75 bushels of coal.

A. Yes, they used it at that time.

Mr. Moran: What time? I didn't get that.

A. Whenever the river was up.

Mr. Broderick: Are you familiar with the location of the water works?

A. I've been around it all the time; used to be like home out there when——

Q. Where with reference to the lock is it located, so the jury may understand?

A. I don't understand that.

Q. Where with reference to Lock 27 was the water works located or is it located?

A. Located on the Mississippi River bank.

Q. Where with reference to the lock, north or south?

A. Locks is southeast.

Q. Was there some method of access to that water works across the slough roadway?

A. There was a pipeline across it, two of them.

Q. Prior to the time the Engineers came in and I guess that was 1947, wasn't it? Is that about the year when this work was started?

A. They started on the lower end of it then.

[fol. 240] Q. And the times you were talking about in response to Mr. Moran's questions is before the Engineers came in; that was sometime before 1947, wasn't it?

A. Yes.

Q. Now, prior to that time was there some method of driving a car or truck across this slough into the water works?

A. They tried to keep a roadway open on low stage of the river.

Q. And the roadway extended across this slough, did it? Was that it?

A. That's right.

Q. Was that made of rock and mud? What was it?

A. They had slag and granite ware and everything else to keep the water from tearing it out, because the water went through so fast.

Q. Was that used to drive back and forth and haul materials across?

A. At low stages of the river.

Q. How long had that prior to 1947, how long had that dike or roadway or earthway, whatever you call it, been in that slough?

A. I can't remember far enough back on the roadway, but the pipeline was put in when the water works was built.

Q. About when was that, could you remember?

A. That was before I was born, along around 1892.

Q. Could you give the jury any judgment about when this roadway was put across the slough?

A. No, I couldn't tell you that; that was as far back as I can remember.

Q. That's been across there as far back as you can remember.

A. Yes, when Pa first come in there they drove across down where the locks is; he used to farm in there before he come to this side.

[fol. 241] Q. When you say they drove across, was there some kind of roadway?

A. They always had to make a roadway when the river went down. They usually had trouble; too; tore it out all the time. That water line was hung on piling and it went out one time that I know of.

Q. Is that when the river was flooding?

A. Yes.

Mr. Moran: Did you understand that? Was the river flooding then or just high?

A. No, it was when it was going down; the river was going back down when it tore it out.

Mr. Broderick: Was it after flood stage?

A. Yes, that had been up high.

Mr. Broderick: I think that's all I want to ask you.

Redirect examination.

By Mr. Moran:

Q. Where did you say flood stage was?

A. Flood stage was supposed to be 30 feet.

Q. They operated this ferry across there—when did they stop operating the ferry?

A. Usually around 28 feet.

Q. How deep would it be when they started operating the ferry down there?

A. I couldn't tell you.

Q. Up to 28 feet they operated the ferry.

A. Sometimes it was low stage and sometimes it was high. It was according to how it washed it out the last time.

[fol. 242] Q. You say this pipeline was pushed out by rushing waters.

A. That's right, they had to pump water from East St. Louis; they never had none here for emergency if there was a fire.

Q. And the only time the roadway—they used the roadway—was on the extreme low stages of the river.

A. That's right.

Mr. Broderick: I object to that.

Judge Lueders: Well, sustained because it would be leading.

Mr. Moran: Well, when was that roadway used that he was talking about?

A. When the river was low.

Q. I see, and only when it was low.

A. That's right.

Q. I'm not going to mark this. Can you look at this and recognize that?

A. I can't recognize the exact spot right now.

Q. But can you recognize what it is?

A. It's a picture of that out there all right.

Q. Are you sure of that?

A. It looks like it.

Q. Well, I mean would it look like it enough you could swear?

A. No, I wouldn't swear.

Q. That that was a picture of Gabaret Shoot.

A. I couldn't swear on account of this here (indicating).

Q. What?

A. This part here.

Mr. Moran: I believe that's all.

Mr. Broderick: This ferry we're talking about, how many years has it been since that ferry was out there, Mr. Beckman, can you recall?

[fol. 243] A. It never went out until the Army Engineers came in there; they used it before that.

Q. Where was it located?

A. Just below 19th Street.

Q. Was it used to get back and forth across the slough?

A. That's right, to get across.

Q. Who was it that used it?

A. The Niedringhaus company used it last, but the Niedringhaus company and water company used it together and paid the expenses together until after the water company had to close down.

Q. That was some kind of a boat, was it?

A. Yes, it was a big barge; the last one was steel.

Q. And it went back and forth across the slough at the place where—someplace where this access road was you were telling us about.

A. Below 19th Street.

Q. Was it close to the roadway?

A. That would be a piece of road lead off from the main road to it.

Q. And about how wide was this slough at that place?

A. I couldn't tell you exactly how wide it was. I should have knowed because I helped pull the cable across it.

Q. Well approximately; don't be exact about it.

A. It was a couple hundred feet over there.

Q. And this ferry so-called went from one end of that 200 feet to the other and back and forth, is that right?

A. Yes.

Q. And used to take coal or what?

A. Coal and teams and that across. Niedringhaus used to farm a lot of land on that side and take stock back and [fol. 244] forth when they worked there.

Q. Was that at a time when the water was high so they couldn't use this roadway?

A. Yes, that's right.

Mr. Broderick: I think that's all.

Mr. Moran: That's all.

JACOB SENKO, having been duly sworn, testified in his own behalf as follows:

Direct examination.

By Mr. Moran:

Q. Your name is Jacob Senko.

A. Yes, sir.

Q. And where do you live, Mr. Senko?

A. Mt. Olive, Illinois.

Q. And how long have you lived in Mt. Olive?

A. Fifty-three years.

Q. What is your business or occupation now, Jake?

A. None now.

Q. And when is the last time that you were employed?

A. 14th day of November, last year, year before last.

Q. 1952?

A. Yes, sir.

Q. On the 5th day of November 1951 where were you employed?

A. On the river.

Q. LaCrosse Dredging Corporation?

A. Yes, sir.

[fol. 245] Q. And what were you doing?

A. I was on the dredge.

Q. Was that the dredge James Wilkinson?

A. Yes, sir.

Q. And how long had you been working on that dredge, Jake?

A. By golly, I couldn't hardly say to you; ever since they moved over out of that big dredge company, and I went down there; I don't know just when it was.

Q. Do you have a hard time remembering those things?

A. That's the truth, that's right.

Q. Now, Jake, would you say that you had worked there more than three months?

A. Oh, better than a year.

Q. Now, always on the dredge, Jake?

A. Yes, sir.

Q. And what were your duties, if any, that you had aboard that dredge?

A. Clean up the dredge.

Q. What about supplies. Did you do anything there about supplies?

A. Yes, sir; I took care of that.

Q. When you say "took care of that", what did you do with the supplies?

A. When it come in I'd put it away, and if they wanted something I'd go up and get it for them or they get it themselves; I show them where it was.

Q. Now, did the people aboard that vessel, or the people aboard that dredge, Jake, did they ever take any soundings?

A. Oh, yes.

[fol. 246] Q. You know what they talk about when they take a sounding?

A. How deep the water is; I done it myself.

Q. You done it yourself?

A. Yes.

Q. On or prior to November 5, 1951, had any of the people aboard that vessel taken any soundings?

A. No.

Q. Before that.

A. Yes, they used to.

Q. About how deep was the water there then?

Mr. Broderick: Let's get the time fixed, George, please.

Mr. Moran: I don't guess you remember the day that you took the sounding.

A. No, I don't.

Q. Would the soundings be taken sometime in the year 1951?

A. Oh, yes.

Q. And how deep was the water there then?

A. All the way from 18 to 22, 23, feet.

Q. I see and Jake, did you ever have occasion to go ashore?

A. Yes, sir.

Q. And when you went ashore, did you wear anything?

A. Oh, yes.

Q. What?

A. Life jacket; you had to wear that; that's orders.

Q. And how did you get ashore?

A. I had a oar boat.

Q. An oar boat.

A. Yes.

Q. And when you got in that boat, did it operate itself or did you operate it?

[fol. 247] A. We wasn't so far from shore; I could take an oar you know—

Q. Prior to the injury, Jake, how did you get ashore?

A. In the oar boat.

Q. Did you row the boat ashore?

A. Yes.

Q. On November 5, 1951, did you have occasion to go ashore?

A. Yes, sir.

Q. And did you take something ashore with you?

A. Yes, sir.

Mr. Broderick: Let's not lead him.

Mr. Moran: What did you take with you?

A. Lanterns.

Q. About how many?

A. Three.

Q. And where did you take those?

A. I give one to—

Q. Pardon me just a moment; did you take them ashore?

A. Yes, sir.

Q. Did you wear anything when you went ashore that night?

A. Yes, sir.

Q. What?

A. A life jacket.

Q. After you got ashore, what did you do?

A. When I got to the shore—I took a life jacket and put it in the boat; then give the lantern to the fellow that called for it and took two of them in the shed.

Q. Where was the shed in reference to being on the east or west bank?

A. On the east side.

[fol. 248] Q. And do you know about how big the shed was?

A. Oh, it wasn't big, about 8 by 8, I guess or 10 by 10.

Q. Was there a stove in the shed?

A. Yes, sir.

Q. And when you got to the shed, did you see anyone?

A. Yes, sir.

Q. And who was there?

A. Was Vic something, I don't know.

Q. Was he a boss of yours?

A. No, I think it was a superintendent or something, I don't know.

Q. When you say superintendant you mean he's a big boss.

A. Yes, I guess he was.

Q. Now, that was Victor Hammack.

A. Yes, sir.

Q. And did you take the lanterns anywhere?

A. Took two in the shed and hung them up.

Q. Now, this shed, Jake, do you know whose shed that was?

A. That belonged to the company, LaCrosse.

Q. Was it on skids or something?

A. Yes, sir.

Q. And was anybody, to your knowledge, ever around there but company men?

A. No.

Q. Now, when you got there, to the shed, was there anybody other than you or Hammack around that shed?

A. No, not at the time.

Q. And, well, tell the Court and jury what happened then.

A. Well, when I got in there the dredge was stopped, because that's why I took the lantern over there. See, I [fol. 249] used to watch; when they wanted to stop they'd flag me; I'd go and tell the engineer they wanted to stop on the bank to do some work.

Mr. Broderick: I don't object to that but I don't believe it's responsive to the question that's asked and move to strike it for that reason.

Judge Lueders: I'll sustain the objection and let's start over with him.

Mr. Moran: How far have you gone to school?

A. Who, me? Not very far.

Q. When you say "not very far"—

A. When I was thirteen years old I was down in the mine.

Q. And you didn't get through the first grade?

A. No, I doubt it.

Q. Don't you know?

A. Well, I used to work in the mine at night and day-time I used to go two miles to school, half a day, see; that's as far as—

Q. That was in the old days, wasn't it?

A. Yeh, sure was.

Q. Now, Jake, did something happen there in the shack?

A. Yes, sir.

Q. Where were you when that something happened?

A. I was right at the doors.

Q. Were you looking any particular way?

A. Well, I looked for a signal from up there, you know, but I didn't have to look all the time.

Q. When you were looking for that signal, did something happen?

A. Yes, sir.

[fols. 250-259] Q. What, if anything happened?

A. All I seen is solid blaze in the shed.

Q. Did you know what happened before that, about a stove or anything like that?

A. No, the coal—I heard the coal rattle and pretty soon everything went up in the air.

Q. After you heard the coal rattle and everything went up in the air, what happened to you?

A. I don't know whether I got blowed out or he pushed me, because the door was awful small for one man to get in, so I don't know if I got blowed out or that man throwed me out.

[fol. 260] Q. Jake, did you ever see anybody around that shed or shanty other than LaCrosse Dredging Company people?

A. No, sir.

Q. Did they ever move that shed or shanty during the course of the year you were working on the job, the thing on the skids?

A. Any place where the dredge moved they moved the shanty.

Q. Who moved it?

A. I don't know.

Q. Was it LaCrosse people?

A. Oh, yeh.

Q. Now, where were your duties, Jake?

Mr. Broderick: Well, now, wait a minute. I think that's repetition. I believe he's been over it.

Mr. Moran: I believe it is, too. I'll withdraw the question. Now, when you went ashore, Jake, for what reason did you go ashore?

Mr. Broderick: I think that's been over, too.

Mr. Moran: I mean generally when you went ashore.

Judge Lueders: Overruled, he may answer.

A. If somebody want anything, I took it over to the shore to him.

Mr. Moran: You only went ashore when you were doing something for the boat.

A. Yes, sir.

Q. Now, how much did you make an hour?

A. Two dollars an hour.

Q. When these men from the shore would signal you, where would you be?

A. I'd be on the dredge.

[fol. 261] Q. And when they signalled you, what would the signal be for, if you know?

A. They signal to stop the dredge; they had some work to do.

Q. When they signalled to stop the dredge, what would you do?

A. I'd tell the engineer they wanted to work on the bank.

Q. What would he do?

A. He would stop the dredge.

Q. How old are you, Jake, now?

A. Sixty-eight.

Q. How old were you at the time of the accident, if you remember?

A. Sixty-six.

Q. And Jake, has there been work available for you if you were able to do it?

Mr. Broderick: Wait a minute, I object to that.

Judge Lueders: Sustained.

Mr. Moran: Well, do you belong to a laborers' local around here?

A. Yes, sir.

Q. The rest of those fellows around there are working.

A. Yes, sir.

Q. You're not working.

A. No, I feel foolish see them go to work and me not.

Mr. Moran: That's all.

Cross-examination.

By Mr. Broderick:

Q. Mr. Senko, you have lived around Mt. Olive for fifty-three years, have you?

A. Yes, sir, come there in 1900.

Q. And you went to work when you were thirteen, did you say?

[fol. 262] A. Right down north, Streeter, Illinois.

Q. You went to work when you were thirteen.

A. Yes, sir.

Q. And you went to school down to the time you went to work, did you?

A. No, I got a job at night and went before dinner, just maybe four hours, but that was two miles to go to school.

Q. Well, now, you belong to the laborers' union, do you?

A. Yes, sir.

Q. And for how many years back, in November of 1951, had you belonged to that organization?

A. About nine years, eight or nine years, something like that.

Q. Your local was around Mt. Olive.

A. Yes, sir, it's there.

Q. And did you sometimes work out of the local in Granite City?

A. Carries out the local from there down here, yes.

Q. When you did that you did it on a permit arrangement, did you?

A. I guess it was, yes.

Q. And before you went out to begin working for the LaCrosse Dredging Corporation, did you work for other contractors around in this area?

A. Oh, yeh.

Q. Did various kinds of laboring jobs, did you?

A. All different kind, carpenter helper and different you know construction work.

Q. Carried hod I suppose, did you?

A. No.

Q. But worked as a laborer on construction jobs and [fol. 263] that sort of thing.

A. Yes, sir.

Q. How did you happen to get out to the LaCrosse Dredging Corporation when you started to work out there?

A. Well, we was out at that time, I think; that's naturally laid off, and I come up to the hall and the man up there that send me out.

Q. Jack Green sent you out, did he?

A. Yes.

Q. And you went out then as a permit man from the laborers' local in Granite City, did you?

A. Yes, sir, they was all from there, working the same way; lots of them from there; every one of them the same way.

Q. All the laborers came the same way, on permit, huh?

A. Yes, sir.

Q. Did you start out there sometime back in 1950; was that about the way it was?

A. Way before that.

Q. You started working for LaCrosse before 1950?

A. Yes, sir.

Q. And what was the first kind of work you did out there?

A. Same thing.

Q. After you started either before 1950 or whenever it may have been, you had worked for a while and then been off for a while, was that it?

A. Any time the river raised they shut down, see, and was laid off.

Q. Or any time the dredge broke down or something of that kind, you would be laid off, too.

A. Well, sometimes help on the dredge, you know.
[fol. 264] Q. Sir?

A. Sometimes helped on the dredge if it break down, but very little.

Q. Whenever it broke down you were laid off, were you?

A. Yes, sir.

Q. Now, I believe you told Mr. Moran that you had never done any work on the bank, was that what you said?

A. I don't remember if I ever did or not. I wouldn't naturally convince myself because I don't remember; not any on the bank or not.

Q. I'll ask you if it isn't a fact—did you ever work with Mr. Lakin? Do you know him, the engineer back here in the courtroom?

A. Yes.

Q. You worked with him setting stakes on the bank, didn't you, from time to time?

A. That was when I was off the dredge.

Q. That's what I say.

A. That's when I was filling them pumps and stuff, you see.

Q. There were times that you worked for LaCrosse Dredging Company when you weren't on the dredge, isn't that right?

A. But I wasn't on the dredge at the time when I worked out like that; I was other job.

Q. And sometimes you would clean the treads on tractors, I guess, wouldn't you?

A. That's when I was working there them four weeks; when I was filling up the fuel oil.

Q. And did you do some shoveling work along the bank, smoothing off the bank, that sort of thing from time to time?

A. No, sir.

[fol. 265] Q. Now, your rate as a laborer, Jake, was \$2.00 an hour, was it?

A. At last I believe it was more, if I ain't mistaken; I think it was more at last, but first that's what it was, \$2.00 an hour.

Q. Now, do you know, in November of 1951 and before that time, were you working on a regular shift?

A. Yes, sir.

Q. Was that an eight hour shift you were working on?

A. Yes, sir.

Q. You were paid by the hour, were you?

A. Yes, sir.

Q. And when you worked more than 8 hours in any one day, were you paid overtime?

A. Yes, sir.

Q. And when you worked more than 40 hours in a week, did you get overtime then?

A. Yes, sir.

Q. Did you work customarily 40 hours a week, was that your schedule?

A. Yes, sir, five days a week.

Q. And you lived at Mt. Olive and drove those 40-odd miles back and forth to work every day.

A. I used to ride with a different fella, I never drove.

Q. You drove back and forth from your home to your job, did you?

A. Yes, sir.

Q. And that was true every day.

A. Yes, sir.

[fol. 266] Q. Did you bring your lunch or your meal with you when you came?

A. Yes, sir.

Q. There weren't any meals prepared on the dredge, were there, for you?

A. No, there wasn't none.

Q. And there wasn't any place on there, any bunks, for you to sleep, or sleeping quarters, were there?

A. No, I never had time to sleep; I had to keep my eyes open.

Q. Now Jake, you didn't belong to any other organizations, labor organizations, besides the hod carriers, did you?

A. No, sir, I used to in the mine, but when I quit the mine that was off.

Q. You didn't belong to the National Maritime Union at any time?

A. No, sir.

Q. Or the Marine Engineers Benevolent Association.

A. No, sir.

Q. Or the Master Mates and Pilots.

A. No, sir.

Q. You were a member of the laborers' union, weren't you?

A. Yes, sir.

Q. And as a member of that union you were hired in by LaCrosse Dredging, is that so?

A. I guess.

Q. Now, at the time you went to work, you didn't sign any papers on that dredge, did you, or anything of that kind?

A. Not as I know of.

Q. You simply went out there because Jack Green sent you, and who did you report to when you started to work?

[fol. 267] A. Pusher, always got a pusher, you know, and we reported to him.

Q. Was the pusher one of the gentlemen that testified here yesterday, the labor foreman?

A. Harvey.

Q. And when you got out there, you reported to Harvey because he was the pusher or the labor foreman, is that right?

A. Yes, sir.

Q. And did he tell you where to go then?

A. No, I know where to go because I was told where to go when I come out there.

Q. Mr. Hammack that you were talking about a while ago, is he the fellow that gave you instructions and told you what to do?

A. He wasn't my boss at all.

Q. Was Nelson? Who was your boss?

A. Nelson was superintendent; at last it was John something, I don't know what was his name; I believe he died few months back, great big fella, awful nice.

Q. But back in November of 1951, Nelson, the superintendent, was the fellow that gave you your instructions.

A. Yes, sir.

Q. And did Nelson have some kind of an office around there, a shelter? Where was his place?

A. That I don't know; whether he ever had one or not I couldn't tell you.

Q. Now, you said something about taking some soundings. This dredge, Jake, back in November of 1951, was pumping some kind of sand or silt.

A. Yes, sir.

[fol. 268] Q. Mud, out of the bottom, was it?

A. Yes, sir.

Q. And that was taken to some place on the bank through a pipe.

A. On the hill; that's naturally where I used to go across and take supplies if they needed any.

Q. And when you took these soundings that you're talking about that you say you did, did you go with Mr. Lakin to do that?

A. No, sir.

Q. Who did you go with?

A. Right on the dredge, see; right on the dredge; the engineer hollered at me and says, "see how deep I am, Jake". They had a big piece of iron on a rope and had knots tied every five or ten feet, see, and drop it down and I showed him how deep it was.

Q. And the purpose of that was to see how deep the dredge had cut out, was it, on the bottom?

A. That's right.

Q. Was that what you did when you took these soundings?

A. Yes, sir.

Q. Now, the dredge was anchored or fastened some way, was it, Jake?

A. Oh, yeh.

Q. And it didn't have any ability to move itself, did it? wasn't self propelled; didn't have a rudder.

A. No.

Mr. Moran: Your question was whether it had a rudder or ability to move itself. You asked two questions at one time.

Mr. Broderick: I'll rephrase the question and withdraw the other. I'll ask you if it isn't a fact when it was neces-

sary to move this dredge from one place to another, it had [fol. 269] to be towed or pushed by a tug; isn't that right?

A. Well, sir, when I was working, see, it never happened. When I come back the dredge was there already, so I don't know how they moved it.

Q. Well, in any event, as long as you stayed on the dredge or worked on the dredge, it wasn't moved any place, was it?

A. They got on them, they got spuds, a great big solid pipe, a solid piece of iron; any time when they swing it and they got cables on the bank, see, what they call anchors, you see, so they got it to that. When they want to go to this side, see, when they go so far they drop one of them spuds; then after, what he does, they lift the other one up and drop the other one, see, on both sides, on the bank end.

Q. That is to maneuver back and forth in order to get the cutter moving, is that right?

A. I guess it is.

Q. But you were never on the barge when it—

Mr. Moran: I object to that; it's a dredge.

Mr. Broderick: Or dredge, thank you. You were never on the dredge when it moved from the area where you were working and went some place else, were you?

A. No, I wasn't.

Q. Now, what time did you go to work on the 5th of November 1951, Lake, do you remember?

A. Well, we started 4 o'clock, the second shift.

Q. Did you go to work at 4 o'clock on the 5th of November 1951?

A. Yes, I guess I did.

Q. Do you remember that that was so?

A. I couldn't naturally say, but that was starting time. Maybe they started earlier on account of we used to go [fol. 270] out in relief gangs, see, you wasn't allowed to go home if your buddy didn't come; you had to work double shift, see, and stay on, see. If he come sooner, well I guess we started sooner; but we always got paid for eight hours.

Q. By an arrangement between you fellows working as

laborers, when your relief got there, you were relieved, is that right?

A. That's right.

Q. And on that particular evening do you remember who it was that relieved you?

A. No, I don't. He never relieved us until after 12 because they couldn't get there; the weather was too bad. It was way after 12 when they relieved us.

Q. You don't remember who it was that relieved you.

A. The fellow that naturally should relieve me, I don't know what his name was, kind of old gentleman already; he worked on the last shift all the time.

Q. Was it Eugene Remsberger?

A. Old fellow already; maybe it is, I don't know.

Q. In any event, on this particular evening of the 5th of November 1951 it was a snowy night, was it?

A. Yes, sir; bad one, too.

Q. And along about you say 10 or 10:30, what time was it when you got ready to come over to shore?

A. When I went across it must have been about 10:30 or something like that, quarter to 11, I don't know; I'm not sure; I'm just guessing at it.

Q. You didn't have very far to go from the dredge to the bank.

A. No.

Q. How far was it?

[fol: 271] A. From the dredge you mean to the bank on the boat? No, I didn't.

Q. About how far was it?

A. I could really take an oar, see, and press and shove myself across.

Q. Was it several feet or a good many yards?

A. I guess it must have been 10, 15 feet, as far as that's concerned.

Q. So you travelled that distance by pushing the boat, the row boat or whatever kind of little boat you came across in.

A. I had oars, you know, but I mean you didn't have to use it when it was that close. When I started from the dredge, got the oar against the dredge and pushed myself right across.

Q. Gave yourself a little push and floated over to the bank. You were that close, were you?

A. That's right.

Q. When you got out did you start up towards the shelter?

A. The man was waiting there, the one that hollered at me; I give him that lantern, give it to him, then I went up to the shanty.

Q. Who was it that hollered to you?

A. I don't know. You couldn't see a thing, that's all, because just naturally was just snowing and coming down.

Q. And you went up to the shelter, did you?

A. Yes, sir.

Q. And this was 10 by 10, or something like that, a wooden building, was it?

A. Yes, sir, a small building, yes.

Q. And had you ever seen any of the government men in and around that building at any time?

[fol. 272] A. I didn't go—I never went much over there unless they wanted something; that's the only time; that's out of my class up there.

Q. So you really don't know who used that because you weren't around there often enough, is that so, or not?

A. If I ain't mistaken I believe they had a name on there, LaCrosse, if I ain't mistaken; don't take me wrong but I think they did.

Q. But you weren't around there often enough to know who actually used it or went in and out, is that so?

A. Yes, sir.

Q. Now, when you got up there, was there any light in this shelter that night when you got up there?

A. I don't think it was.

Q. And you had two lanterns, did you?

A. Yes, sir.

Q. And did you get inside then and hang up the lanterns?

A. Yes, sir.

Q. And there was a stove, you say, in there.

A. Yes, sir.

Q. And a coal bucket or scuttle or some coal around some place.

A. I don't know coal bucket, was coal in it; I hear it rattle afterwards.

Q. And was Vic Hammack there when you got there?

A. He was; if I ain't mistaken he was outside, come in when I did.

Q. And did you see what he did after he got in there?

A. Well, he said "I'm going to put some coal in the stove," and the door was just naturally enough for one [fol. 273] man, little better, to go through, you see; door was awful small.

Q. The door of the stove you mean?

A. No, the door of the shanty; and the stove, it was one of them you lift the top, that's naturally where they put the coal in, from the top.

Q. Lift the lid up and put the coal in from the top.

A. Yes, sir, when he dumped that in, that's all I remember was everything in blaze; workmen had lunch, sandwiches and everything; they'd naturally roast.

Q. You saw Vic take up—

Mr. Moran: He didn't say that.

Mr. Broderick: Let me ask hi

Mr. Moran: You're telling him, you're not asking him.

Mr. Broderick: Well, are you objecting?

Mr. Moran: I'm objecting; ask him what he saw Vic do.

Mr. Broderick: Let's let the Court pass on it.

Judge Lueders: Overruled.

Mr. Moran: Your Honor, I'm going to state for the rule, it's not proper for this type of witness; he's not been through the first grade.

(Discussion off the record.)

Judge Lueders: Overruled, let's have the next question.

Mr. Broderick: You saw Vic take up the coal—

A. No.

Q. —and put it in, did you?

A. He said, "I'm going to put some coal in the stove"; I was looking out of the door.

Q. I see.

A. Then pretty soon I seen it's a blaze, just naturally [fol. 274] everything was in blaze inside.

Q. You heard the coal rattle in the bucket, or whatever it was.

A. I heard a bucket hit when he put the coal in the stove, then it was all in blaze. I guess he come and I went, both of us out of the door.

Q. Now, Jake, what other kind of work have you done besides the mine and as a laborer?

A. I done most everything to be honest about it.

Q. Did you wrestle at one time?

A. Yes, sir, I sure did; had a lot of fun with it.

Q. Well, in any event, Hammack came out the door and you were in the doorway and the two of you went out the door together.

A. I guess we did.

Q. And you fell on your shoulder; did you?

A. Must have, you know; must have fell in there and him on top of me or not, I don't remember, that's for sure.

Q. And did your shoulder hurt you then at that time?

A. Well, I tried to get up, see, and I couldn't; never had strength enough to brace myself, when you're my size. It got to hurting me, I said, "By God, I believe I got my arm broke or something". I don't know whether he picked me up or I got up myself.

Q. Did you stay around there that night?

A. Yes, sir.

Q. Was it snowing and bad?

A. Awful.

Q. Then the next day you went home and as you said went to see Dr. Warner, is that so?

A. Yes, sir.

.

[fol. 275] Q. You did work after those four weeks for the company, too, didn't you?

A. Yes.

Q. And did you ever work for the company at any other place than around there by the Wilkinson?

[fol. 276] A. Yes, I think two days for a Williams down there I worked; naturally I got sent out there; they was loading up iron and stuff on a barge and they put me on the bank; all I done is slip a rope underneath, hooked it, and they took it away. I was setting on that bank all day.

Mr. Moran: Nice job.

A. Yes, it was.

Mr. Broderick: Let me ask you this, Jake. You went down and worked on the lower canal, didn't you? Did you go down there and work for Wheeler or somebody else for the company?

A. That's the place you know I told was two days I worked there.

Q. Did you work from about May of 1952 through November of 1952 until the work on the lower canal was completed?

A. Well, I worked right along until completed, you know; that's 14th day of November when they got done; that's when they got laid off, I think.

Q. Well, you worked until the job was finished in any event, didn't you?

A. Yes, sir.

Q. Have you been to see any doctor, doctors in the last year?

A. Well, I got some pills, I'll tell you the truth, you know I did. I went over and got some pills on my own account, you see, because I couldn't sleep at night. There's a doctor there, so I got—I explained to him and he give me some pills.

Q. All right, did you back to Dr. Harell at any time after he discharged you?

A. Oh, yeh.

Q. After he discharged you and told you to go back to [fol. 277] work, did you go back to see him after that?

A. Yes, I went there after that.

Q. Then did he finally discharge you from further treatment and told you you didn't have to come back?

A. Well, that's something I can't recall; I went up on my own account and said, "Doc, I'm pretty near—"

Mr. Moran: What did you tell him, Jake?

Mr. Broderick: Anyhow, that's all right; since he had discharged you no other doctor has treated you, has he?

A. Well, yes, there's one of them; I couldn't stand that pain at all, then he give me a shot.

Q. Who was that?

A. That's Dr. Shoemaker; he done it at home, see.

Q. Did you see him one time?

A. Yes.

Q. Have you seen or been treated by any other doctor except Dr. Shoemaker since you were discharged by Dr. Harell?

A. That's all.

Q. You didn't, Jake complain about any pain in your neck, did you, to Dr. Harell?

A. No, not at that time, no.

Q. And you were treated by him for quite a little while, weren't you?

A. Yes.

Q. Did you ever complain about any pain in your neck to him?

A. Well, what he said, exercise, "you'll work that out."

Q. Not what he said; did you ever tell him there was something the matter with your neck?

A. He told me to raise my arm up and I said, "Doc, I [fol. 278] can't; it's shooting up in here."

Q. Did you ever have any other kind of accident with broken bones before the 5th of November 1951?

A. No, sir. You asked me a while ago whether I was wrestling. I had my neck stretched that far and it didn't bother me (indicating).

Q. "That far" must have been about three feet, as you have indicated, wasn't it?

A. I didn't see it but I imagine it was that far.

Q. Well, you had a little pain in your neck, I guess, when that happened, didn't you?

A. No, it never did bother me; no it didn't, that's the God-honest truth, never did bother me.

Q. Did you ever have any broken ribs?

A. Yes, I had 'em cracked but I don't know whether they was broken; I had 'em cracked.

Q. You're what, now, sixty-eight did you say?

A. I'll be sixty-nine the 18th day of July.

Q. How much did you weigh?

A. About 190 or 200 pounds; you could always take off but you can't add.

Q. Let me ask you this: your testimony here is that you didn't put the coal in this stove, is that right?

A. No, I didn't.

Q. Just one or two other questions. Do you know what it was that caused the fire in the stove to burn up in the way you have indicated?

Mr. Moran: I object to that, Your Honor; that would be purely speculative and be a guess.

Mr. Broderick: I asked him if he knew; I didn't ask him to guess.

[fols. 279-282] Judge Lueders: Overruled; he may answer if he knows.

A. I don't know; I had nothing to do with putting the coal in or nothing; I don't know; gasoline or might be something like that, I don't know.

Mr. Broderick: You don't know then; that's the answer, is it? you don't know what caused it to burn the way that it did.

A. No, I don't.

Q. You have worked for a good many building contractors in Madison County, haven't you?

A. Yes, sir.

Q. The Millstone Construction Company.

A. Yes, I guess I did.

Q. And H. F. Kennedy at Litchfield.

A. By God, I don't know.

Q. Generally speaking, you have done a lot of work as laborer for building contractors in this area for a good many years.

A. That's right, I've made my living that way.

Mr. Broderick: I think that's all, Mr. Senko.

Mr. Moran: But no work for any building contractor since November of 1952, is that right?

A. No, no, no.

Q. Jake, this month's work that you said you did on the bank, was that before or after the accident?

A. By golly, I couldn't tell you that, that's the God-honest truth; if I had to tell you, I don't know. But see, we used to come down every time when you was off or something.

[fol. 283] Mr. Moran: Plaintiff will rest, Your Honor.

MOTIONS FOR DIRECTED VERDICTS AND RULINGS THEREON

(At this point court was adjourned for the day.)

Before adjourning, Defendant had submitted the following Motions for directed verdict, said Motions being in words and figures as follows:

And now comes the defendant at the close of all the evidence introduced by plaintiff upon the trial of this cause and moves the Court to give the jury the following instruction, to-wit:

"The Court instructs the jury to find the defendant not guilty."

The above motion was *denied* by the Court.

[fol. 284] And now comes the defendant at the close of all of the evidence introduced by plaintiff upon the trial of this cause and moves the Court to give the jury the following instruction, to-wit:

"The Court instructs the jury to find the defendant not guilty as to Count I of plaintiff's amended complaint."

The above motion was *denied* by the Court.

[fol. 285] And now comes the defendant at the close of all of the evidence introduced by plaintiff upon the trial of this cause and moves the Court to give the following instruction to the jury, to-wit:

"The Court instructs the jury to find the defendant not guilty as to Count II of plaintiff's amended complaint."

The above motion was *allowed* by the Court.

[fol. 286] And now comes the defendant at the close of all of the evidence introduced by plaintiff upon the trial of this cause and moves the Court to give the jury the following instruction, to-wit:

"The Court instructs the jury to find the defendant not guilty as to Count III of plaintiff's amended complaint."

The above motion was *allowed* by the Court.

[fol. 287] And now comes the defendant at the close of all of the evidence introduced by plaintiff upon the trial of this cause and moves the Court to give the jury the following instruction, to-wit:

"The Court instructs the jury to find the defendant not guilty as to Count V of the amendment to the amended complaint."

The above motion was *allowed* by the Court.

[fols. 288-294] (The following proceedings were had on May 13, 1954.)

Mr. Beatty: Now comes the plaintiff and moves the Court to dismiss Count 5 of the plaintiff's Amended Complaint.

Mr. Broderick: Motion that is made is directed to the Court asking the Court to dismiss Count 5 of the Amendment to the Amended Complaint. I might say for the record that following the time when plaintiff rested last night, the defendant's motion directed to that particular count, as well as to the other counts, were presented to Your Honor and were argued at length. The defendant's position is that the plaintiff has had his day in court and has had an opportunity to adduce evidence in support of the fifth count or Count 5 of the Amendment to the Amended Complaint. No evidence to make a cause of action under any allegation of that count has been presented and we think as a matter of law it is now before Your Honor to rule as to whether a cause of action or evidence to support a cause of action has or has not been adduced. We contend there has not been—that the defendant is entitled to judgment on that Count on the basis of the evidence or the absence of evidence to support it, and I don't believe the motion made for voluntarily dismissing, as I understand the nature of the motion made by counsel, is proper and I suggest it be denied and let the Court rule on the motion for judgment.

Judge Lueders: Let the record show that the plaintiff's motion as to dismissal of Count 5 is overruled and let the record further show that defendant's motion at the close

of plaintiff's case for a directed verdict is allowed as to Counts 2, 3 and 5 and overruled as to Count 1.

[fol. 295] STIPULATION BETWEEN PLAINTIFF, JACOB SENKO
AND DEFENDANT, LACROSSE DREDGING CORPORATION BEFORE
THE INDUSTRIAL COMMISSION

Mr. Broderick: If Your Honor please, I would like at this time to introduce into evidence and to read into the record at this time a stipulation which was entered into between the plaintiff in this case, Jacob Senko, and LaCrosse Dredging Corporation, the defendant, who appeared respectively as Petitioner and Respondent in a proceeding before the Industrial Commission, No. 481804, such stipulation having been made on the 4th of February 1953 in such case and before Arbitrator Thomas Q. Keefe at the City Hall in the City of East St. Louis, Illinois, at which time Petitioner was represented by counsel and Respondent was represented by counsel. The stipulation being entered into as follows: "It is agreed and stipulated by and between counsel for the respective parties, being the said Jacob Senko and LaCrosse Dredging Corporation, as follows: That the Petitioner and the Respondent were on the 5th day of November 1951, operating under the provisions of the Workmen's Compensation Act of the State of Illinois, and that the relationship of employee and employer existed between the parties on that date; that on the 5th of November, 1951, the Petitioner sustained accidental injuries which did arise out of and in the course of his employment; that notice of the accident was given the Respondent within the time required by the statute, the application for adjustment of claim denotes on its face the same was filed within one year as required by the statute. Petitioner at the time of the injury was sixty-six years of age and had no children under 18 years of age. First aid, medical, surgical and hospital services have been provided by the Respondent herein. Compensation in the amount of \$357.00 at the weekly rate of \$25.50 covering a period of 14 weeks has been paid to the Petitioner by the Respondent. This is in full of temporary total incapacity for work. The following matters are in dispute,

one, the earnings of the Petitioner during the year next preceding the accidental injury, two, the nature and extent of the disability." That concluded the stipulation as entered into by counsel for respective parties at that time.

Mr. Moran: Let the record show plaintiff's objection for reasons stated previously, Your Honor.

Judge Lueders: Objection overruled.

MYRON LAKIN, having been duly sworn, testified on behalf of defendant as follows:

Direct examination.

By Mr. Broderick:

Q. Tell us your name and residence address.

A. Myron Lakin. I live at 4530 North Dayman, Chicago, Illinois.

Q. What is your occupation or profession?

A. I'm a civil engineer.

Q. Did you have some particular training for that profession?

A. Yes, sir.

Q. What was it?

A. I went to the University of Illinois.

Q. Are you employed now?

A. Yes, sir.

[fol. 297] Q. By whom?

A. LaCrosse Dredging Corporation.

Q. When did you begin your employment with LaCrosse Dredging Corporation?

A. August 1949.

Q. Did you at any time work for the LaCrosse Dredging Corporation in or around the area we have been talking about during the progress of this trial as the Chain of Rocks Canal?

A. Yes, sir.

Q. When approximately was it that you began working at that place for that company?

A. I came to Granite City in March of 1950, I believe.

Q. And how long did you continue in your employment

for that company in and around that Chain of Rocks Canal?

A. Until about January of 1953.

Q. What kind of work was it that you were engaged in doing for the LaCrosse Dredging Corporation, Mr. Lakin?

A. I was doing the field engineering work for the dredging operations and building of levees.

Q. What did that entail so far as actual duties were concerned or work that you did?

A. Through means of surveying instruments I showed the dredge where to dig and showed them where to put the levees and how high to build the levees and how deep to dredge.

Q. Did you have persons assisting you in and about doing that type of work?

A. Yes, sir.

Q. Are you acquainted with Jacob Senko, the plaintiff in this case?

A. Yes, sir.

[fol. 298] Q. And were you so acquainted with him in the month of November of 1951?

A. Yes, sir.

Q. Did you know him before that time?

A. Yes, sir.

Q. Will you tell the Court and jury whether at any time prior to the 5th of November of 1951 he had ever helped you in discharging the duties that you have described that you were doing on the bank?

A. Yes, sir, he did.

Q. What kind of work did he do in helping you, Mr. Lakin?

A. He helped me drive stakes and dig holes for these big stakes that we set to build levees.

Q. Those stakes that you set, where was it they were set?

A. On the land.

Mr. Moran: Your Honor, just for the record, I should have objected sooner but I'm going to object and ask the answer be stricken unless a more definite time is fixed.

Judge Lueders: Well, overruled for the moment.

Mr. Broderick: I'll ask the last question. Where was it you were setting these stakes you're telling us about?

A. On the land where we were building the levees.

Q. And the purpose of those stakes was what?

A. Show you where to put the levee and how high to build it.

Q. Was there any other type of duty that Mr. Senko performed for you or under your supervision before the 5th of November of 1951 that you haven't told us about?

A. Not that I can recall, no.

Q. Were you familiar with the labor shelter that's been referred to during the course of this trial?

[fol. 299] A. Yes, sir.

Q. Could you tell us what kind of a building it was again, please?

A. Well, it was a wooden frame building; I imagine it was about 10 by 12.

Q. And had a roof and sides, did it?

A. Had a roof and sides, wood sides and shingled roof.

Q. Could you give us the approximate location of that labor shelter on the 5th of November 1951, Mr. Lakin?

A. Yes, sir, it was on the southeast side of the proposed canal, about Station 60.

Q. And Station 60 would mean what, with reference to the Lock 27?

A. Would be about 300 feet downstream from the lock.

Q. And downstream would be south or north or which way?

A. South.

Q. Were you working on the 5th of November of 1951?

A. Yes, sir.

Q. And what hours did you work on that day?

A. From 8 in the morning until approximately 4:30 in the evening.

Q. Did you have occasion to be in the labor shelter?

A. Yes, sir.

Q. Do you have any recollection now about what the weather conditions were on the 5th of November of 1951, as to whether it was cold or mild or what it may have been?

A. It was cold and pretty windy, I believe.

Q. And could you tell us whether you had occasion to be in that shelter more than once on that day?

[fol. 300] A. Yes, sir, I was in and out all day to keep warm.

Q. Prior to the 5th of November of 1951 had you had occasion to be in the labor shelter?

A. Yes, sir.

Q. And would you tell the jury or give us some idea as to whether that was frequent or infrequent?

A. I was in there every day when it was cold; of course, when it was warm I didn't bother to go in there.

Q. What was inside this shelter in the way of equipment, if there was anything at all?

A. We had some benches for the men to sit on around the perimeter of the shed, and a stove in the center; that's about all I believe.

Q. Can you tell me or tell the Court and jury whether or not there were on the 5th of November of 1951 and prior thereto, any persons other than those employed by La-Crosse Dredging Corporation that had access to or in fact used the shelter for the purpose that you did?

Mr. Moran: I'm going to—no, that's all right, go ahead and answer it.

A. Yes, sir, there were.

Mr. Broderick: Could you tell the Court and jury who they worked for or what individuals they were?

A. Well, the Corps of Engineers, they have inspectors on the job; they came in for the same purpose that I did, to get warm, and I believe River Construction Company had some men working in the vicinity and they used to come in there. And then Massman Construction Company, but I believe they didn't come in there until after the beginning of 1952.

Q. On whose property was the labor shelter located?

[fol. 301] A. Well, it's government property.

Q. And would you tell us whether or not there was or wasn't a lock on the door of the shelter?

A. I don't recall there ever being a lock on the door.

Q. Could you tell us whether or not on the 5th of November 1951 that door was locked on the shelter?

A. No, sir, because we usually pump 24 hours a day and it's always open.

Q. Could you tell the Court and jury or do you have any recollection about who it was that did or didn't use the shelter in the hours that you were working on the 5th of November of 1951?

A. Well, it wasn't restricted to anybody; anybody that was out there could use it.

Mr. Moran: I object to that answer and ask it be stricken as not being responsive.

Judge Lueders: Well, sustained, it's not responsive.

Mr. Broderick: Who was out there on that day other than employees of LaCrosse Dredging Corporation to the best of your recollection?

A. Well, there were government engineers, and River Construction Company employees.

Q. Without specifying by name, can you tell the Court and jury whether or not on the 5th of November of 1951 any of such persons did or did not use the shelter?

A. Well, I don't remember the exact day.

Mr. Moran: I object then.

Mr. Broderick: All right, you don't have any particular reason to remember the 5th of November of 1951.

A. No, sir.

Q. What you have told us about was the practice that was being—

[fol. 302] Mr. Moran: I object to what he told about the practice, Your Honor. Ask Mr. Broderick to refrain from stating to the jury there was a practice out there of using that.

Mr. Broderick: Maybe if I completed the question it might not be improper.

Judge Lueders: Let's see what the question is.

Mr. Broderick: What you have said to us in your testimony then, as I get you Mr. Lakin, is simply what was being done in a general way so far as use of the labor shelter

was concerned on and prior to the 5th of November of 1951, is that right?

A. Yes, sir.

Mr. Broderick: You may inquire.

Cross-examination.

By Mr. Moran:

Q. Mr. Lakin, how wide was that water across the canal on the 5th day of November 1951, the canal?

Mr. Broderick: I object to that as not cross-examination.

Judge Lueders: Unless it's connected with his direct examination; I can't tell at this time—

Mr. Moran: I'm testing his recollection. He's remembering a lot of stuff; I want to see if he remembers that.

Mr. Broderick: I object to the comments of counsel.

Judge Lueders: Overruled, he may answer.

Mr. Moran: How wide was that stream down there south of the Locks on November 5, 1951?

Mr. Broderick: Let the record show my objection, please, and if I can have a standing objection I won't repeat it.

Judge Lueders: Let the record show.

A. At what point?

[fol. 303] Mr. Moran: Right opposite the shack or shed, whatever you called it.

A. I'd say about 300 feet.

Q. And are you sure about that now?

A. Yes, sir.

Q. You're sure that was it on November 5, 1951, 300 feet wide.

A. Approximately, I didn't have a tape and go out and measure it.

Q. And how deep was it?

A. I don't recall the river stage at that date, sir.

Q. You mean it went up and down with the river?

A. Sure, yes, sir.

Q. And you said that this shack was downstream from the lock about how far?

A. 300 feet.

Q. And when you say downstream, what do you mean?

A. South.

Q. That's a maritime expression, isn't it, downstream?

A. I wouldn't know, sir.

Q. And upstream?

A. I wouldn't know.

Q. Landlubbers don't use it, do they?

A. I'm not a landlubber.

Q. I know you're not.

Mr. Broderick: Wait a minute, I object!

Judge Lueders: Sustained.

Mr. Moran: You're a maritime man, aren't you?

Mr. Broderick: Wait just a moment; If the Court please—

Judge Lueders: Sustained.

A. That's silly.

Mr. Moran: Now, did you furnish the engineer data to [fol. 304] show that dredge how and where it worked?

A. Yes, sir.

Q. And how did the dredge get in the south mouth of that canal down there?

Mr. Broderick: Object to that as not proper cross-examination.

Mr. Moran: It has connection with his engineering duties and so on and so forth.

A. I didn't show the dredge—

Mr. Broderick: Wait just a moment!

Judge Lueders: I believe that's getting beyond the scope of cross-examination; sustain the objection.

Mr. Moran: Well, you didn't build a levee all the way down to the mouth of the canal, did you?

A. No, sir.

Q. And when you make these measurements about how you build a levee and so on and so forth, Mr. Lakin, and when you do build the levee, where does that dirt come from you build the levee with?

A. Out of the bottom of the water.

Q. Don't say stream now.

Mr. Broderick: If the Court please, I don't believe that that's proper for counsel to interject that type of comment; it's not warranted.

Judge Lueders: All right, sustain the objection.

Mr. Moran: Where does it come from, Lakin?

A. Comes from the bottom.

Q. Bottom of what?

A. The water.

Q. What water?

A. The water where we're dredging.

Q. And you remember that area out there pretty well; you remember about the laborer shelter, don't [fol. 305] you?

A. Yes.

Q. Was that one continuous stream of water from the south lock of the canal all the way to the river, do you remember that?

Mr. Broderick: I don't believe that's proper cross-examination, if Your Honor please.

Mr. Moran: Just testing his memory, Your Honor.

Judge Lueders: Sustain the objection; that's beyond the scope—

Mr. Moran: He remembered these other things and I thought he'd remember what that was; that's the reason I think it's proper.

(Discussion off the record.)

Mr. Moran: The River Construction employees on November 5, 1951 had nothing to do with the operation of your dredge, did they?

A. No, sir.

Q. And they had nothing to do with your dredging operation either ashore or afloat, is that correct?

A. That's correct.

Q. And the employees of the River Construction Company had no business to tell you at all how and where to dredge; you were doing that by a sub-contract from them?

Mr. Broderick: Wait a minute, I object to that as entirely improper and not cross-examination.

Judge Lueders: Sustained.

Mr. Moran: Did that thing have skids on it, that shack?

A. You mean the shelter?

Q. Yes.

A. Yes, sir, it had skids on it.

Q. When you moved that shelter from place to place, you didn't do it to accommodate the employees of the River Construction Company, did you, Mr. Lakin?

A. No, sir.

[fol. 306] Q. You did it for the exclusive benefit of the LaCrosse Dredging Corporation, isn't that true, sir?

A. That's true.

Q. And you, Mr. Lakin, or some other employee of the LaCrosse Dredging Corporation, had the exclusive right to say who went in that shack and who went out, is that correct?

Mr. Broderick: Wait just a moment. I think that's probably calling for the legal conclusion of this witness.

Judge Lueders: Well, overruled.

A. Will you repeat the question, please.

Mr. Moran: I believe I said you or some other employee of LaCrosse Dredging Corporation had the exclusive right to say who went in and out of that shack, is that correct?

A. Well—

Q. I believe you can answer that yes or no.

A. No, I can't, sir.

Q. Then go ahead.

A. The shed was put there at the request of the labor union.

Q. All right, then the shed was put there at the request of the labor union. Let me ask you this: Could you exclude any known employees of LaCrosse Dredging Corporation from that shack, shed or shelter, whatever you call it?

A. I couldn't, no, sir.

Q. Could any employee or your superior exclude them?

Mr. Broderick: Wait, I think that's objectionable, speculative.

Judge Lueders: I'll sustain it.

Mr. Moran: Then I'm going to ask who asked the shed be put there and ask him to answer my question I asked before.

Judge Lueders: What is your question now?

[fol. 307] Mr. Moran: My question before was, you or some other employee of LaCrosse Dredging Company had the exclusive right to determine who went in and out of that shack when it was out there. I don't believe he answered the question properly, Your Honor.

Judge Lueders: Well, if this witness doesn't know and I think that was the effect of his answer.

Mr. Moran: He didn't say that, he said the labor union asked us to put it out there, but he didn't say—

A. Well, the shanty was put there at the request of the labor union.

Mr. Moran: I object to that answer and ask it be stricken.

A. I don't understand your question, sir.

Mr. Moran: I said, you or some other employee of the LaCrosse Dredging Company had the right to determine who went in and out of that shack.

A. I wouldn't know.

Q. You don't know that. I see. Now, what was the River Constriction Company doing out there on November 5, 1951?

A. I didn't say they were out there.

Mr. Broderick: Wait just a minute!

Mr. Moran: I thought you did, I'm sorry if you didn't. Was the River Construction Company employees out around the area where you were working and the dredge was working on November 5, 1951?

A. I do not recall on that day.

Q. And as far as you know there were no employees of the River Construction Company out there on the 5th day of November 1951.

A. I couldn't say there were and I couldn't say there weren't.

Q. If they were out there they would have had no work to do; the only work going on was the dredging operation at that time and that place, wasn't it?

[fol. 308] A. No, sir.

Q. The River employees were up in the lock proper, weren't they?

A. They were working all over the area, cleaning it up and I remember one time they were leveling off some sand out in that area.

Q. Now, what station was the dredge working on that day?

A. I can give you an approximate station.

Q. Approximately.

A. I'd say about 56.

Q. Do you remember the day or the date or approximate date that you said Senko was working out there driving stakes with you?

A. No, sir, I don't.

Q. Well then, when you told Mr. Broderick that it was sometime prior to November 1951 he was assisting you out there, were you in error?

A. I do remember him working for me; I don't remember the exact date.

Q. I didn't ask you that, I said were you in error when you said you remembered it was sometime prior to November of 1951?

A. No, sir, I was not in error.

Q. Well, to this extent you remember it was before November 5, of 1951.

A. Yes, sir.

Q. And you don't know how long before.

A. No, sir.

Q. You know whether it was a month or two months, three months, four months, you just don't remember that.

A. No.

Q. It could have been a year, couldn't it?

A. Could have.

Q. And it could have been while the dredge was temporarily laid up, couldn't it?

[fol. 309] Q. It could have been a month after November 5th too, couldn't it?

A. Yes, sir.

Q. You know that Senko was employed on November 5, 1951 for LaCrosse Dredging Corporation.

A. Yes, sir, I believe he was.

Q. And you know what his duties were aboard the dredge, do you, on that date?

A. Well, from what I've heard in the courtroom.

Mr. Moran: I object to what you have heard; do you have an independent recollection of him working there on November 5?

A. No, sir, I don't.

Q. Prior to the time that you have been on the stand, Mr. Lakin, have you been discussing this matter with anyone?

A. Yes, sir.

Mr. Moran: I see; that's all.

Mr. Broderick: Mr. Lakin, would you tell the Court and jury whether, prior to the 5th of November of 1951, the time or times when others than employees of LaCrosse Dredging Corporation may have been in that shelter.

Mr. Moran: I object to that, Your Honor, as being repetitious.

Mr. Broderick: If you did at any time observe any such persons put coal in the stove in the shelter.

A. Yes, sir, I did.

Q. Could you tell the Court and jury whether that was frequent or infrequent or give us any further information about that?

A. Well, whoever was in the shed and got cold or the furnace was going out, they'd put more coal in it.

Q. You say furnace?

[fol. 310] A. Well, the stove.

Mr. Broderick: I believe that's all.

Redirect examination.

Mr. Moran: The shed had a sign on it, didn't it?

A. I don't recall, sir.

Q. Didn't the shed have a sign on it?

A. I really don't—

Q. I didn't finish my question, please; didn't the shed have a sign on it saying, "LaCrosse Dredging Company" or "LaCrosse Dredging Corporation"?

A. No, sir, I don't believe it did.

Q. The shed was owned by LaCrosse Dredging Corporation, wasn't it?

A. Yes, sir.

Q. And maintained by them, wasn't it?

A. Yes, sir.

Q. And moved by them, wasn't it?

A. Yes, sir.

Mr. Moran: That's all.

Mr. Broderick: But it was on government property did you say?

A. Yes, sir.

Q. And as such had access for others who were working in and around—

Mr. Moran: I object to the last question, Your Honor, for several reasons. Do you withdraw it, Mr. Broderick?

Mr. Broderick: No, sir.

Mr. Moran: Let the Court rule on the question. I objected to the question, Your Honor.

Judge Lueders: Well, it's probably been covered by this witness; unless there's some additional phase of it the objection will be sustained.

[fol. 311] Mr. Broderick: I think that's all, Mr. Lakin.

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A. M. THOMPSON, having been duly sworn, testified on behalf of defendant as follows:

Direct examination.

By Mr. Broderick:

Q. You have been sworn, sir, have you?

A. Yes, sir.

Q. Will you give the Court and jury your name.

A. A. M. Thompson.

Q. And your residence, Mr. Thompson.

A. Evanston, Illinois.

Q. Would it be unfair to ask you to state your age?

A. Sixty-four years and about 50 months.

Q. What official position, if any, do you presently hold with the LaCrosse Dredging Corporation?

A. I'm president of the LaCrosse Dredging Corporation.

Q. Was that true back in November of 1951?

A. Yes, sir.

Q. Do you have any other kind of work or business connection other than as president of the LaCrosse Dredging?

A. Yes, sir.

Q. Would you tell us what it is?

A. I'm an officer and member of the Board of Directors of the Mississippi Valley Barge Line Company.

Q. Prior to November of 1951 had you had any experience in operating barges or equipment that plied the Mississippi River?

A. Yes, sir.

[fol. 312] Q. And what did that experience consist of?

A. In 1938 I was one of the originators or founders and subsequently an officer of the Central Barge Company.

Q. What kind of work was the Central Barge Company engaged in doing?

A. The Central Barge Company was engaged in transportation of commodities on the Mississippi River and the tributaries.

Q. And could you give us geographically within what reach the Mississippi and the tributaries took you insofar as transportation was concerned of commodities by the Central Barge Company?

A. In 1951?

Q. No, 1938 and thereafter.

A. In 1938 the principal business of the Central Barge Company was the transportation of coal from Alton, Illinois to the twin cities during the open season of the Mississippi River and from Havana, Illinois into the Chicago area, transportation of coal from the Chautauqua District on the Ohio River into Cincinnati.

Q. As an officer and one of the operators of the Central Barge Company, did you have anything to do with the employment of men who operated those barges in plying the rivers?

A. Yes, sir.

Q. And how much experience or over what period of time prior to 1951 did you have experience in hiring such men?

A. Since the formation in 1938 of the Central Barge Company.

Q. How long have you had a familiarity or been engaged in the business of dredging, Mr. Thompson?

A. Something over 40 years.

Q. Could you tell us what kind of personnel it was at the Central Barge Company employed to operate the tows and barges plying the river and moving the commodities [fol. 313] as you have described them?

A. Well, generally speaking, there were three different types of help employed. There was the pilots, the masters; then there was the engine room crew, they were licensed engine men; and unlicensed men, the deckhands and the galley force.

Q. The galley force were ones that prepared the meals, is that so?

A. Yes.

Q. Did you employ any of this kind of personnel for your barges that were plying the Mississippi River in the St. Louis area?

A. Yes, sir.

Q. And can you tell the Court and jury where it was that you went to get that type of personnel?

A. There were three separate unions; Master Mates and Pilots union, where I say the pilots and steersmen came from.

Q. The steersmen; that is the name that implies a pilot.

A. Yes, sir.

Q. Is that some kind of a labor organization?

A. Yes, sir, it's an association.

Q. Known as the—

A. Master Mates and Pilots Affiliated, it's part of the American Federation of Labor.

Q. Did they have some office or offices in and around St. Louis?

A. Yes, sir.

Q. Where else did you go for the personnel that you used to operate your barges up and down the Mississippi?

A. Engineers and strikers or oilers were obtained from

the Marine Engineers Benevolent Association who also had offices in St. Louis.

[fol. 314] Q. And is that a labor organization?

A. Yes, sir.

Q. And was there any other organization to which—

A. The National Maritime Union was where we got the deckhands and unlicensed personnel.

Q. Did they have some office or place of operation in the St. Louis area?

A. Yes, sir, they have.

Q. Can you tell the Court and jury what qualifications or abilities a seaman has?

A. Well, a seaman is expected to be able to splice lines, splice cables, operate the winches.

Q. What are those?

A. Those are revolving drums upon which you wind your rope to tighten up the tow.

Q. All right.

A. They should have some knowledge of navigation, they should understand how to make up a tow consisting of as much as 18, 20 barges, they should be—

Q. Barges that you're talking about is what kind of equipment now?

A. They are non-propelled barges.

Q. And are used for what purpose?

A. For carrying cargo.

Q. All right, anything else?

A. As I say they should have some knowledge of navigation rules, act as lookouts, understand signals.

Q. What does that mean when they act as lookouts; what do they do?

[fol. 315] A. They proceed to the forward end of the tow, particularly going around curves so they can have a vision ahead, signal back to the pilot if necessary. In weather where the vision is not very extensive, they take the advantage of the length of the tow to inform the pilot if there are any obstacles or oncoming craft.

Q. Do they have anything to do with the lighting equipment on the tows?

A. Yes, they place the running lights on the tows; they

maintain the search lights on the boat in good operating condition by replacing them with carbons as they wear out.

Q. Did you make some reference to bilge pumps?

A. Yes, to a degree responsible for the safety of that tow; if a leak—water comes in from any cause whatsoever, either rain or a puncture of the hull, they watch that; if it happens they put in the bilge pumps and keep them pumped down.

Q. What is the bilge pump?

A. A bilge pump is a pump put into the hull to extract the water that may have leaked in through improper hull or rainwater, however it gets there.

Q. When these tows you're telling us about are made up, what are they? What do they have as component parts?

A. You mean as a cargo?

Q. No, as equipment.

A. You have a power vessel which is usually nowadays propelled by deisel engines; then you have these cargo barges which are assembled in front of it, either filled with commodities or returning empty from deliveries.

Q. And when these tows reach port or the terminal wherever they are going, do the seamen have anything to do with taking them apart?

[fol. 316] A. Yes, they have to take out the barges that are destined for that particular location, cut them out of the tow, re-make the tow. On the upper Mississippi River and also on the Illinois River these tows have to be broken up, part of the barge is pushed through the locks, then the remainder are joined up with them after they pass the locks. They have to make up those tows, make them ready for the locking.

Q. Could you tell the Court and jury whether the Central Barge Company and other barge companies, to your knowledge, in the period of time that you have been describing from 1938 down to 1951, had any contractual arrangement or agreement with the three unions that you have mentioned as the Master Mates and Pilots, the Marine Engineers Benevolent Association and the National Maritime Union for the supplying of the personnel for the operation of these barges?

A. Yes, sir.

Mr. Moran: When was that, Bob?

Mr. Broderick: I'm asking from 1938 to 1951, including 1951.

Mr. Moran: Just a moment!

A. Well, prior to 1951 they got the personnel from the unions that I tried to describe.

Mr. Broderick: Was that true in 1951?

A. Yes, sir:

Q. Now, what kind of hours did the seamen work?

A. Those working rules have been somewhat changed. It was about that time that the seamen, deckhands, when they were on a boat—

Mr. Moran: Is this prior to 1951?

A. Yes.

Mr. Moran: I'll object to them then, Your Honor.

A. And subsequent.

[fol. 317] Mr. Broderick: Tell us what the situation was along in November and on the 5th day of 1951, will you please?

A. I believe at that particular time the seamen worked—I know they worked 6 hours a day on duty and 6 hours off, two watches a day.

Q. And where did they live while they were doing their watches?

A. They lived on the tow boat.

Q. Did they take their meals there?

A. Meals were provided for them at the company's expense.

Mr. Moran: Is this in November of 1951?

Mr. Broderick: I'm talking about the 5th of November of 1951.

A. Yes.

Mr. Moran: All right.

Mr. Broderick: And what other services, if any kind, were provided for the seamen on the barges where they were living?

A. Well, they had facilities for doing their laundry, and as I said, board and keep.

Q. And were their quarters provided where they slept?

A. Yes, sir, and a lounging quarters where they could amuse themselves, play cards, when they were off duty.

Q. And could you tell us how they were compensated, whether on an hourly basis or some other basis?

A. They were paid by the month.

Q. Were they paid overtime when they worked more than 8 hours a day?

A. They were not subject to the wage an-hour act.

Mr. Moran: I object to that, Your Honor, and ask it be stricken.

Judge Lueders: Well, it's not exactly responsive so it will be stricken.

Mr. Broderick: Were they paid additional compensation when they worked more than 8 hours in one day or 40 hours in one week?

[fol. 318] A. No.

Q. They got no premium pay for working overtime hours.

A. No, over 40 hours, no.

Q. Will you tell the Court and jury when the seamen went onto a tow or type of barge with power equipment attached to it as you have described it, did they sign papers or articles or something of that sort?

A. They had to give their address, their age—I don't recall the information that was requested from them.

Q. Is that what is referred to as signing papers?

A. I believe it is in the inland waterways, yes, sir.

Mr. Moran: I object to what he believes it is unless he knows.

Mr. Broderick: Well, your best judgment about it.

A. It is.

Mr. Moran: Not on that, he ought to know; I object unless he knows.

Mr. Broderick: All right, do you know?

Judge Lueders: Sustained unless he knows.

A. I don't know precisely.

Mr. Broderick: You spoke about a running light, Mr. Thompson; would you tell us what those are?

A. Well, there are certain lights required by the Steamboat Inspection Service, now presently the Coast Guard, which makes you have a red, green light and amber light on the head of the tow, the same system of lights on the tow boat.

Q. And are there any other types of lights or signals along the rivers that have any particular name?

A. Yes, sir.

Q. What do you call that?

A. They call them markers, buoys with lights on them.

[fol. 319] Q. And when you describe the knowledge which a seaman should have of the lights, did you refer to that type of light?

A. That type of light and also the running lights of oncoming craft.

Q. Do any of the personnel—let's start with the captain or the pilot, are they required to have any type of preliminary training in their line of work before they sign on and before you employ them?

A. On steamboats they have to have a license.

Q. And do you know what is required in order to get that kind of a license?

A. They have to have apprentice in preliminary time running the rivers, then they have to take a very difficult or detailed examination by the Steamboat Inspection Service.

Q. And who is it that issues the license?

A. The Steamboat Inspection Service.

Q. Is that some kind of a governmental service?

A. Yes, sir.

Q. Would you tell the Court and jury what kind of equipment it was that LaCrosse Dredging Company was using in its operations in November of 1951.

Mr. Moran: I'm sorry, go ahead, I was going to object to the question as being too general. You mean as to navigation or operating the dredge? Go ahead.

Mr. Broderick: What kind of equipment did the LaCrosse Dredging Company have and use in November of 1951 in the conduct of its dredging operations?

A. They had a barge upon which was mounted a pump driven by a deisel motor on its auxiliary equipment; we [fol. 320] had bulldozers, drag lines or chains, trucks.

Q. Now, was that the type of equipment that LaCrosse had out around the Chain of Rocks Canal in November of 1951?

A. Yes, sir.

Q. And will you tell in a general way how that was situated and for what purpose it was used?

A. Well, we were under a sub-contract—

Q. Not about the contract; I want to know where your equipment was generally located.

A. In 1951 it was in the lock contract area doing excavating, building levees, shaping them up.

Q. Did you have any scrapers or bulldozers or trucks at that time?

A. Yes, sir.

Q. And where was it, they were generally located?

A. Generally located in and around our operations.

Q. And you said you used drag lines.

A. Yes, sir.

Q. What are those?

A. Those are land machines which have a long boom by which, through a system of cables, are able to excavate, pick up ground and swing around and deposit it where it's required.

Q. Did you have occasion, from time to time during the period when LaCrosse Corporation was engaged in working in and around the Chain of Rocks Canal, to be on the job?

A. Yes, I visited it.

Q. Do you know about when it was that river traffic first went through the canal?

A. February or March 1953.

Q. Do you remember when it was that the lock was dedicated?

[fol. 321] A. In May 1953.

Q. Will you tell the Court and jury if prior to the months of February or March of 1953 any river traffic had gone through this project that we have called the Chain of Rocks Canal?

A. Not to my knowledge.

Mr. Broderick: You may inquire.

Cross-examination.

By Mr. Moran:

Q. Now, Mr. Thompson, this dredge that was working south of Lock 27 on the 5th day of November was about 300 feet downstream from the south portion of that lock, is that about correct?

A. I do not know.

Q. You don't know that.

A. No, sir.

Q. You do know it was somewhere between the south end of the lock and the mouth of the canal.

A. Yes, sir.

Q. You know that because of the contract that you had to dredge that area out, don't you? Did you hear me?

A. Yes.

Q. You know that because of the contract that you had to dredge that out.

A. Yes, sir.

Q. Now, the dredge that was in there on November 5, 1951, did it come through the mouth of the canal?

A. Yes.

Q. And you pushed it through with a small boat, didn't you?

A. Part way.

Q. It floated through, didn't it?

[fol. 322] A. Yes.

Q. Now then, prior to the 5th day of November 1951, the south mouth of the canal then was capable of floating a dredge the size of the James Wilkinson through, is that correct?

A. At certain stages of the river, yes.

Q. At least it did, didn't it?

A. In 1947—I beg your pardon, that was a different dredge.

Q. That came through there in 1951, didn't it?

A. The James Wilkinson came from the north end in 1950.

Q. But I mean it went over south of the lock in 1951, didn't it?

A. It operated in the Spring of 1950 on the north end of the lock, then it was moved to the south end of the lock by going north and around and came in the lower end, yes.

Q. When it was moved north it went all the way up the channel to Hartford or wherever that thing ends up there, is that correct, the Chain of Rocks Canal?

A. After it had been dredged, yes.

Q. It floated up there and was moved by small boats. What do you call those boats that move that dredge?

A. Dredge tenders.

Q. And the dredge tenders are operated by whom? What kind of a union operates those dredge tenders?

A. The engineer on there is obtained from the operating engineers.

Q. Now, the operating engineers do handle some water equipment, do they not, Mr. Thompson?

For short moves these dredge tenders move the dredge; for a move I believe—

[fol. 323] Q. Pardon me, I'm sorry; I'm going to just answer the question that they do handle some water equipment, isn't that true?

A. Yes.

Q. Now, a dredge tender is how big?

A. They vary in size.

Q. How big were these ones that moved your dredge?

A. Thirty-two feet I estimate.

Q. About how wide?

A. Eight feet.

Q. What size motors do they have on them?

A. Approximately 100 horsepower.

Q. The engines then are a hundred horsepower motors.

A. Some are greater, some less.

Q. You have some thousand horses on the dredge though, don't you?

A. Yes.

Q. Is it two dredge tenders that moved this up the canal or what?

A. I don't recall.

Q. Ordinarily do you use one or two?

A. Depends on conditions.

Q. Anyway, you go upstream toward the north of the canal and come down the Mississippi River, is that correct?

A. That was a commercial vessel that towed it down and possibly up, I do not know. We don't usually take such long trips with a dredge tender.

Q. Did you say towed it up on November 5, 1951?

A. No.

Q. When did the commercial vessel tow the dredge up?

A. It didn't tow the dredge all the way in. The James [fol. 324] Wilkinson was brought down in the Spring of 1950.

Q. Down from where?

A. Down from the Mississippi River.

Q. About how far?

A. Through a slough called Gabaret Slough; it dug its way through.

Q. It didn't dig its way through the slough, mouth of the slough, did it?

A. No.

Q. Any digging that was done through the mouth of the slough was on the north end and not the south end.

A. That's right.

Q. When the dredge was first brought down, how was it brought down?

A. Brought down from where?

Q. Where was the dredge just prior to the time you started on the lock job?

A. That dredge was working down below Chester, Illinois.

Q. How did you bring it from Chester?

A. We hired a tow boat to bring it up.

Q. Then it went all the way; is that upstream or downstream from Chester, the locks, sir?

A. Chester is south.

Q. When you come from Chester to Granite City locks, are you going up the river or down the river?

A. You're going north, up the river.

Q. Up the river, all right, and then as you say she cut her way into the canal through the north mouth of the Gabaret Shoot.

A. That's where she got to the canal; her first work on the canal was on the north end.

[fol. 325] Q. Now, Mr. Thompson, prior to November of 1951, your dredge, the James Wilkinson, had also gone through the lock gates, had it not, one time?

A. I don't recall.

Q. You don't know that or you don't recall?

A. I know it went through but I don't know the date.

Q. You knew it went through.

A. Yes.

Q. Before November of 1951?

A. I don't know when.

Q. You were supposed to cut a plug out south of that lock, weren't you?

A. Yes, sir.

Q. That plug was to be cut before November of 1951, wasn't it?

A. I don't recall.

Q. Mr. Thompson, in order to get out to cut that plug didn't you go through the lock gates? Didn't they open the gates and let you out there to cut that plug?

A. At one time they let us through.

Q. And one time you came through and came through the south end of the canal and into a station somewhere between Station 60 and Station zero zero zero.

A. Yes, sir, approximately.

Q. Now, Mr. Thompson, tell me whether or not your dredge, the James Wilkinson, was not 130 feet long.

A. 136 I believe.

Q. And how wide?

A. Thirty-six.

Q. And what is the draft of it?

A. I believe five and a half feet.

[fol. 326] Q. Mr. Thompson, is not your dredge, the James Wilkinson, equipped with navigation lights?

A. There are certain lights required for stationary objects.

Q. I asked you if your dredge were not equipped with navigation lights?

A. No.

Q. I ask you, Mr. Thompson, to define a navigation light.

A. Navigation lights, I believe, are lights required by

regulations for a vessel operating up and down a navigable stream.

Q. Sir, do you not have a light on your dredge if you're in the Mississippi River to show when you're working or where you're working?

A. We have certain lights, yes.

Q. Do you have that type of light?

A. No.

Q. And these lights that you have, how many lights are on that vessel?

A. I couldn't say; on the dredge?

Q. Yes, how many of those lights, those signal lights.

A. What is required for a stationary operation is a flag-staff with two balls, one above the other, and lights at night on those balls indicating a stationary—

Q. But that is navigation vernacular, when you indicate that something is stationary, something moving, and so on.

Mr. Broderick: I object to that, if Your Honor please; it's argumentative.

Mr. Moran: He's testified about other navigation things. I think I can properly ask it.

Judge Lueders: Read the question back please.

Q. But that is navigation vernacular, when you indicate [fol. 327] that something is stationary, something moving, and so on.

Judge Lueders: Sustain the objection.

Mr. Moran: Who requires it? Is there a requirement by the government that you have such a light, Mr. Thompson?

A. Yes.

Q. And when you came upstream from Chester, Illinois, was your vessel, the dredge tender, James Wilkinson, did it have lights on it then?

A. I don't recall.

Mr. Broderick: Wait just a moment!

Mr. Moran: He said he didn't know.

A. I don't know your question; I didn't understand it.

Mr. Broderick: Wait just a moment! I don't believe that's been the testimony.

Mr. Moran: I asked him if he did.

Mr. Broderick: I think the witness has stated that the commercial tow boat of some kind brought the dredge from Chester; your question assumes that the company's dredge tenders did that and the witness hasn't so testified.

Mr. Moran: Well I'm sorry. When the vessel was brought up whether it was brought up—and you say it was brought up by some tug or something like that.

A. Yes, a commercial vessel.

Q. It was probably towed, was it not?

A. Yes.

Q. And there are certain lights required for a towed vessel, is that right or not?

A. Part of a tow, yes.

Q. Then when you came up there, up that river, you were moving on navigable waters of the United States and you [fol. 328] were equipped for navigation, were you not?

A. We were moving on navigable waters of the United States. The tow boat which we hired, it was assumed was operating under the regulations.

Q. Well, you had tow boats, on these non-propelled barges, didn't you?

Mr. Broderick: Let's get the time and place.

Mr. Moran: He said he had non-propelled barges and he was president of the Central Missouri Barge Line and that these particular barges were towed by certain mariners and mates of certain maritime unions. Is there any difference in towing one of those barges and towing your dredge?

A. The barges which are used in transportation are documented barges.

Q. I mean the actual towing.

A. Well, the shape and makeup of a tow are vastly different.

Q. I mean that you used mariners and seamen on a non-propelled vessel, did you not? Didn't you testify that you used seamen on a barge that had no motive power of its own?

A. As part of a tow; they are attached to the vessel not the barges.

Q. Let me ask you this: You said that you had some non-propelled barges, is that correct?

A. The Central Barge Company.

Q. Did the Central Barge Company have some non-propelled barges?

A. Yes, sir.

Q. Those non-propelled barges had no machinery on there.

A. That's correct.

[fol. 329] Q. They had no motive power of their own.

A. That's correct.

Q. And you used seamen on them.

A. They were used from the power boat where they lived and was their headquarters.

Q. But you used seamen on the barges, didn't you?

A. Yes.

Q. Now, in order to take fuel on the James Wilkinson, you had to have someone on there with a tankerman's license, did you not?

A. Yes.

Q. Where does that man who has that tankerman's license get his license from?

A. I don't recall who was tankerman.

Q. He gets a license from the Federal government, doesn't he, the Coast Guard, doesn't he?

A. Yes.

Q. Now, you didn't have any bilge pumps on those non-propelled barges, did you?

A. The Central Barge Company had bilge pumps on the main tow boat which they moved around from barge to barge.

Q. I asked you if you had any bilge pumps on those non-propelled barges.

A. Of the Central Barge Company?

Q. Yes.

A. Yes, there were bilge pumps on them from time to time.

Q. You mean they didn't come with the vessel?

A. No.

Q. Now, I believe you testified before that when you moved this particular dredge up and down the river, and it was being towed, that you must have towing lights on it. [fol. 330] In other words, there's a vessel being towed.

A. As a vessel being towed.

Q. There are certain lights, you have to have from a navigation standpoint of a vessel being towed.

A. Yes, sir.

Q. Do you know what those lights are?

A. They have to have a red light, portside, a green light on starboard side; certain lights I don't know what on the tow boat.

Q. You mean the portside of the dredge, sir?

A. No.

Q. Well, you say the vessel being towed, the vessel being towed meaning your dredge.

Mr. Broderick: Now wait just a minute! I think that's argumentative; he's answered the question directly.

Mr. Moran: I ask the answer be stricken because he did not answer my question. I asked him about the vessel being towed; he evidently answered me about the towing vessel. Let me ask you this: When your vessel is being towed—you know what I mean, something else is towing it.

A. Yes.

Q. The dredge, does that dredge have to have, by regulations, lights on it?

A. Depends on where in the tow it was located.

Q. If a commercial craft were towing your vessel up the Mississippi River and the dredge was the only one behind the commercial craft, would it have to have lights on it?

A. Not being behind the commercial craft, no.

Q. Would it have to have lights on it if it were being pushed?

[fol. 331] A. If it were the only piece of equipment that they were moving.

Q. Then if you move it by dredge tender you say if it's the only piece of equipment you were moving—

A. I say if it were the only piece of equipment with the motive power.

Q. What do you mean by the only piece of equipment with the motive power?

A. Well, you stated if it was—the dredge was the only thing being towed.

Q. Then it would have to have lights.

A. Yes.

Q. Even if the dredge was behind the towing vessel?

A. That is a circumstance that never occurred; I don't know; they are never towed.

Q. They're pushed.

A. That's right.

Q. Okay, they push you up the river then. If they push you up the river then you have to have some lights.

A. I stated it depended upon the location in the tow of that dredge.

Q. If you were pushed up the river and you were the first one out, wouldn't you have to have lights on, if you were the lead vessel wouldn't you have lights?

A. Yes.

Q. And if one commercial craft pushed you up the river and you were the only two craft, your dredge would have to have lights, wouldn't it?

A. Yes.

[fol. 332] Q. What would those lights be?

A. The same lights, a red light on the port, starboard green light. I believe they require a center light now.

Q. On the dredge itself?

A. On the foremost piece of equipment towed.

Q. If your dredge were the foremost piece of equipment being towed, you would have to have a red light on the port and green light on the starboard, is that correct?

A. Yes, sir.

Q. Now then, prior to the time that your vessel moved up to the Chain of Rocks, sir, it had to be equipped for navigation, isn't that correct, as far as lights were concerned?

Mr. Broderick: Wait just a minute! I haven't objected up to this point but I think it's very speculative, Your Honor. He's been asked about circumstances and conditions that appertain to the Mississippi River and the movement of this boat by other means and vessels on the navigable waters of the Mississippi and it's quite beyond anything we have for consideration here. It goes far beyond the scope of any cross-examination. It's beyond the scope of any circumstances we have in this case. I don't think it's proper for any purpose.

Mr. Moran: Your Honor, my position is that the witness

has testified that certain types of vessels that he was familiar with had certain navigation aids, running lights and so on and so forth, and implying at least to me that the dredge, James Wilkinson, was different from these other water craft because it didn't have these particular lights, and what I'm wanting to find out now is what the difference is.

Judge Lueders: Well, I think it's been pretty well covered but I'll overrule the objection. Do you understand the question?

[fol. 333] Mr. Moran: I can state it; if I misstate it you tell me, Bob. Prior to the time that your dredge moved up the Mississippi to go to the locks, it had to be equipped with navigation lights, isn't that correct?

Mr. Broderick: I think that's argumentative.

Judge Lueders: Yes, sustained.

Mr. Moran: Read the other question back; I thought I stated it right; I think the Court overruled the objection to the other one.

Judge Lueders: Only that you could proceed to inquire but I wasn't overruling the form of the question which I had forgotten what the question was.

(Question re-read.)

Q. Now, then, prior to the time that your vessel moved up to the Chain of Rocks, sir, it had to be equipped for navigation, isn't that correct, as far as lights were concerned?

Mr. Moran: My purpose was, Your Honor, I thought that he had implied at least that there were no such lights or equipment on the dredge itself prior to the 5th day of November, 1951, by stating that they were on other vessels.

Mr. Broderick: I think he's been over that clearly three or four times; it's repetitious.

Judge Lueders: I doubt that that question adds anything to the cross-examination; it will be sustained as being repetitious.

Mr. Moran: Now, do you have an inspection service when you have an inspection on your service on your dredge down there now?

Mr. Broderick: I object to that.

Mr. Moran: Well, he's talking about Steamboat Inspection Service on these other vessels and I'm asking if he has inspection service—I'm trying to show it was different than this one.

Q. You have an inspection service on that dredge?

A. No.

[fol. 334] Mr. Broderick: I object to that.

Judge Lueders: Overruled, he's answered it.

Mr. Moran: Now, you mean sir, that you're operating now, that there aren't any government people inspect that vessel or inspect any of the work?

A. Not from the Steamboat Inspection Service.

Q. I mean any inspection service from the government.

A. We have an inspection service from safety—from the Corps of Engineers who are in charge of the engineering on the job.

Q. That's government, isn't that right, United States government, Corps of Engineers?

A. Yes.

Q. Now, these seamen that you talked about before on these other vessels had to take soundings, did they not? They should know how to take a sounding, on the craft?

A. On a navigable stream.

Q. The vessels you were talking about.

A. The Central Barge Company, yes.

Q. And you take a sounding by having some kind of an iron or lead pellet on the end of a line and dropping it down into the water.

A. No.

Q. You don't?

A. No, not necessarily.

Q. Isn't that one of the ways of doing it?

A. One of the ways.

Q. With certain markers on the line.

A. That's one way of doing it.

Q. When a person does that he's doing the work of a seaman, is he not?

[fol. 335] A. On a navigable stream.

Q. When he's doing it on a non-navigable stream you say he's doing the work of the vessel, isn't he?

A. I don't think so.

Q. What is a tributary?

A. A tributary is a small stream entering into a larger one.

Q. And you said the Central Barge line worked on the Mississippi River and the tributaries, is that what you told the Court and jury?

A. Yes, sir.

Q. And you only worked on navigable water then, didn't you, sir?

A. Yes.

Q. So when you worked on the Mississippi River and tributaries you were working on, small streams running from the large stream, is that correct?

A. Navigable streams.

Q. I said you only worked on navigable streams but I said you worked from small streams into—from the large stream into smaller streams; that's what you mean a tributary, isn't that correct?

A. Improved waterway.

Q. Tributary doesn't have to be improved.

A. Then we were not on it.

Q. You said you worked on tributaries of the Mississippi River.

Mr. Broderick: I object to that as argumentative.

Judge Lueders: Yes. Are you about finished? If not, we'll recess. We'll take a recess until 1:30.

(After noon recess, Mr. A. N. Thompson resumed as witness.)

Mr. Moran cross-examining.

Mr. Moran: Mr. Thompson, you have certain engines or motors aboard the dredge, is that correct?

[fol. 336] A. Yes, sir.

Q. Incidentally, who made your dredge?

A. The dredge was designed by a consulting engineer in Chicago, the Wilkinson, and it was built by the St. Louis shipyard, St. Louis Steel and Shipyard I think it's called.

Q. Now, you have a certain piece of machinery on the dredge which supplies the power to operate the anchors, is that correct?

A. Yes, sir.

Q. And those anchors are operated by means of winches.

A. Yes, sir.

Q. And around these winches go, I presume, steel cables.

A. Yes, sir.

Q. And these steel cables are approximately how thick?

A. Approximately an inch and an eighth, inch and a quarter in diameter.

Q. What size horsepower engine do you have for those winches? How big a horsepower is that?

A. I can't tell you exactly; I don't recall.

Q. Do you know approximately?

A. Approximately 75 horsepower.

Q. Now you also have a piece of power machinery that pumps the sand into the pipe, is that correct?

A. Yes.

Q. How big a motor is that?

A. Direct connected to the pump is a thousand horsepower motor.

Q. Thousand horsepower. Now, you also have some engines that operate these spuds on the back end, isn't that correct?

A. May I describe?

Q. Yes, and how big are these spuds?

[Vol. 337] A. 50, 55 feet.

Q. Now, your boat, or dredge rather, it supplies its own power, does it not, sir?

A. For what purpose?

Q. It manufactures its own power for lights and for everything that it has aboard there.

A. Yes.

Q. Now, you talked about what the duties of a seaman were before on these barges and things like that; on these companies that you were president of, I wonder if you ever had on there such a thing as an apprentice seaman.

A. I don't recall.

Q. You mean you got all your seamen fully trained?

A. No, we accepted what the union sent us.

Q. Now, these barges, these non-propelled barges that you had, they didn't have any names, did they?

A. They were designated by number.

Q. But you didn't designate them John Jones or anything like that?

A. Not the barges.

Q. Now, the James Wilkinson was designated by name, was it not, sir?

A. Yes.

Q. And it's named after some person, isn't it?

A. Yes.

Q. And that's usually what you do with a sea-going or water borne craft of a certain size, you name them after people, don't you?

A. Not necessarily.

Mr. Broderick: I object to that.

[fol. 338] Mr. Moran: Now, on these barges that you had going up and down the river, who cleaned up the decks?

Mr. Broderick: Are you talking about those that he was operating or the Central Barge Company?

Mr. Moran: The Central Barge Company; who cleaned them up?

A. When necessary, the deckhands.

Q. The deckhand, and did you ever take soundings?

A. Me?

Q. No, aboard there; did they ever take soundings?

A. Yes.

Q. Who usually takes soundings?

A. Deckhands.

Q. And who usually handles the supplies?

Mr. Broderick: On what, George?

Mr. Moran: On those boats that he was talking about.

Mr. Broderick: He's talked about several.

Mr. Moran: Well, the craft that you were talking about before, the barges and the boats that you said you got—I mean where you got the type of boats—where you got the pilots and mates and engine crew and deckhands from, who on those particular type of craft that you were talking about and where they were, who handles supplies?

A. On the barges?

Q. Yes.

A. I think longshoremen.

Q. After they once got on and were going there, who took care of any supplies that would be necessary for the operation of the barge or the vessel that was pushing the barge?

A. Well, the barges required those supplies; if you have reference to the cargo is one thing, if you have reference—

Q. After the cargo—after you once got going I mean; you've got certain supplies on a dredge, haven't you, that [fol. 339] you use?

A. Yes.

Q. Now, on another sea-going vessel or a vessel that you go up and down, don't you have some sort of supplies there?

A. On the boat?

Q. Yes.

A. Yes, we have them on the boat.

Q. Who handles the supplies?

A. Engineer room supplies are handles by the engineer room crew.

Q. Outside of the engineer room who handles it though?

A. It's the duty of the deckhand to take charge of the tackle, to keep it in repair and condition.

Q. That's supplies?

A. Tackle, yes.

Q. How about chow?

A. That's in charge of the galley crew.

Q. Who hauls it back and forth and lifts it and carries it?

A. It was delivered by a supplier; it would be I believe a longshoreman.

Q. Now, once you get aboard, the longshoremen don't take the stuff and store it in the hold of the vessel.

A. I believe the longshoreman passes it to a laborer; from the bank to the boat it's carried by a longshoreman.

Q. A longshoreman's duties are primarily ashore, isn't that right?

A. Both.

Q. You don't take a longshoreman on a voyage with you, do you?

A. No.

Q. Does it require a particular skill to operate one of these tenders?

A. No.

[fol. 340] Q. Could I operate one?

A. I couldn't say.

Q. Well, I mean could anyone operate one that had never been on a tender?

Mr. Broderick: I think that's argumentative, if the Court please; I don't want to question George's ability; he probably might be able to but I don't think it's a proper question.

Mr. Moran: It's preliminary.

Judge Lueders: Well, I think the objection will be sustained.

Mr. Moran: Could a person who has no familiarity at all with water craft just walk on a tender, sir, and operate it?

A. I can't answer that, sir.

Q. It requires some skill, doesn't it, some special knowledge.

A. I wouldn't know the background of the person that you refer to.

Q. I mean anybody. It requires a little more knowledge perhaps than the ordinary person has to operate a tender say that would push a 136 foot long dredge, isn't that true?

Mr. Broderick: Wait just a moment! I think that's improper, if the Court please; it's speculative and talking about a tender; we're talking about something that isn't in issue here.

Mr. Moran: Dredge tender he said.

Mr. Broderick: It wouldn't be proper cross-examination.

Mr. Moran: I think it is and I'll explain my position to the Court.

(Discussion off the record.)

Mr. Moran: Who did operate your dredge tender? Have you got a dredge tender called—

[fol. 341] Mr. Broderick: Show my objection to this line of questions.

Mr. Moran: Have you got a dredge tender called a sally?

A. Yes, sir.

Q. I don't mean the name of a person but when that's out there operating is there any person from any particular union that operates it?

A. Yes, sir.

Q. Where is that person from?

A. The engineers, operating engineers' union.

Q. And the operating engineers of where, East St. Louis, Illinois?

A. Yes, sir.

Q. And according to the contract that you were talking about doesn't the operating engineers have the jurisdiction of these particular dredge tenders and dredges so—

Mr. Broderick: Wait just a moment! I don't think he's talked about that kind of contract.

Mr. Moran: He's talked about certain contracts and I'm asking under this particular arrangement here where you have a dredge tender that pushes a dredge for a short distance and where you have these particular dredge tenders that go back and forth from the shore to the dredge, if those people don't come out of the operating engineers local in East St. Louis.

Mr. Broderick: That's been asked and answered; he said yes.

A. I said yes.

Judge Lueders: He's answered that question.

Mr. Moran: And the laborers that you have aboard those dredges come out of this labor organization local, is that correct?

A. Yes, sir.

Mr. Moran: That's all.

[fol. 342] Redirect examination.

Mr. Broderick: Mr. Moran asked you about the seamen that you were describing who were employed aboard these tows travelling up and down the Mississippi River and hauling these barges. He asked you if they took sound-

ings; what is the purpose of taking soundings under those circumstances?

A. In water that might be shallow going over a reef in the river.

Q. For the purpose of determining the safety for navigation, is it?

A. Yes, sir.

Q. Now, some question Mr. Moran asked you about government inspectors inspecting the dredge, the Wilkinson; I think you answered that the United States Engineers did that type of inspection. Did they inspect other equipment or did they back in November of 1951 besides the dredge?

A. Yes, sir, they inspected all the equipment on that entire project at various times.

Q. Did that include the drag lines and other things you have described as being on the bank?

A. Yes, sir.

Q. Now, Mr. Moran asked you when it was necessary to move—strike that. This dredge isn't capable of moving under its own power, is it? Being self propelled?

A. No, sir, it's not.

Q. And the motors you have aboard or the engines are used for the purpose of pumping and running the generators to produce the electricity used, is that so?

A. Yes, sir.

Q. Now, Mr. Moran asked you about lights which you used on this dredge Wilkinson in the event it became necessary to move it up and down the Mississippi River. Would [fol. 343] you tell the Court and jury what the circumstances are as to the imposition of lights under those circumstances.

A. Well, when a commercial towing company or organization undertakes to move the equipment, it immediately passes into the complete control of the master of the towing vessel. We have nothing to say as to how the tow is made up and he is expected to comply with the navigation laws in existence.

Q. And what happens or did happen under those circumstances, assuming that it was being pushed on the Mississippi River from Chester to Granite City or thereabouts? What kind of lights or were there any lights? You weren't there I understand.

A. I wasn't there. It's the duty of the master of the towing vessel to supply the proper lights.

Q. And the towing vessel master supplies whatever lights there are necessary on the dredge, is that so?

A. To comply with the law.

Q. You have been engaged in two different kinds of businesses, I take it, from what you have said; that is, transportation by water and then this earth moving or dredging, is that right?

A. Yes, sir.

Q. Are you able, Mr. Thompson, starting with Mr. Senko's first employment with LaCrosse Dredging, to give us the days that he worked both before and after November 5 of 1951?

Mr. Moran: I'm going to object to this, Your Honor, because it's not the best evidence.

Mr. Broderick: I simply asked him if he was able to do it.

A. There are means of doing it.

Mr. Broderick: Let me put it this way: Starting with say the 1st of January of 1951 and ending with the 14th of November of 1952, are you able to tell us on what days [fol. 344] Mr. Senko worked?

Mr. Moran: Your Honor, I object to any testimony and he pulled out some records; I think the recordkeeper for LaCrosse Dredging Corporation is here and I object to any testimony from records unless they put the keeper of the records on the stand.

Judge Lueders: Well, we haven't gotten that far yet.

Mr. Moran: He asked him if he could tell the days; okay, go ahead.

Judge Lueders: Let's see what the answer is.

Mr. Broderick: I asked you if you could tell. Do you have some memo with you?

A. Yes, I have a memorandum.

Q. Is that memo, can you tell us, prepared from the original records kept in your office in Chicago?

A. It was.

Q. And is it an accurate memo?

A. To the best of my knowledge, it is.

Q. Was it prepared from your supervision from the original records.

A. It was.

Q. Do you have the memorandum with you?

A. Yes, sir.

Mr. Moran: I'm going to object to the memorandum, Your Honor. The books are in court here and so is the bookkeeper.

Judge Lueders: Objection will be sustained.

Mr. Broderick: All right, that's all, Mr. Thompson.

Mr. Moran: That's all.

(At this point an Employment Record of Jacob Senko was marked for identification Defendant's Exhibit A, and offered into evidence. Objection to admission thereof sustained.)

[fol. 345] Mr. Broderick: I would like to call Mr. Senko under Section 60 for cross examination, please.

JACOB SENKO, having been previously sworn, testified as follows:

Cross-examination.

By Mr. Broderick:

Q. You are the same Mr. Senko who has testified previously.

A. Same one, still living.

Q. And you are the plaintiff in this law suit, aren't you, sir?

A. Yes, sir.

Q. Mr. Senko, I would like to ask you if it isn't a fact that your first employment with the LaCrosse Dredging Company began on the 22nd of May of 1950 or thereabouts.

A. No, it was before that.

Q. Were you working in May of 1950?

A. I don't remember.

Q. And do you remember whether you were working in October of 1950?

A. No, I don't remember; we used to get laid off so often, I don't know.

Q. But during 1950 you were working on and off, is that right?

A. I guess; I don't know.

Q. Sir?

A. I don't remember whether—I guess if I worked there, we did; that's the way we worked, on and off.

Q. You would work for a few days or weeks and then be off for a few days or few weeks.

A. Yes, sir.

Q. And in 1951 do you remember whether you were working in March of 1951?

[fol. 346] A. No, I don't.

Q. And do you recall whether you worked in April of 1951?

A. By God, I don't recall it, no.

Q. Well, do you recollect that you were working off and on in 1951 for the dredging company?

A. Well, I guess I was; I don't know when it was; all right, I guess I worked there.

Q. And getting down to the month of August, did you work a day or two in that month in 1951, can you remember?

A. By God, I can't; that's sure I can't.

Q. And after the 5th of November of 1951 you did come back and work on the 6th, did you, do you remember?

A. I don't know. I was working pumping that fuel oil, about that you mean? or what you mean, I don't know. See, I worked four weeks there, I know.

Q. Was that in 1951 or after November, do you mean?

A. Well, I guess it was in 1951, I don't know; I couldn't tell you that.

Q. Well, in any event, you did work in 1952 for several months, didn't you?

A. No, I don't believe; I didn't work any at all since 14th day of November. I got laid off, I think it was in 1952; I didn't work after that.

Q. That was the day that the project was completed, in 1952.

A. I guess it was.

Q. And you had been working there prior to that time and until the work was finished, is that so?

A. Yes, sir.

Q. And that was the Calumet on which you were working, or around there where it was working.

[fol. 347]. A. It's that big dredge; I don't know the name of it.

Q. And were you doing the same kind of work that you had been doing prior to that time?

A. Yes, sir.

Q. Mr. Senko, you filed an application with the Illinois Commission, did you, for compensation, workmen's compensation?

A. They sent for me to file.

(At this point a Notice of Decision of Arbitrator was marked for identification Defendant's Exhibit B, offered in evidence and admitted into evidence over plaintiff's objection.)

Q. Was there one filed for you, was there an application filed for you before the Commission?

A. I guess it was.

Q. And you had a hearing, did you not, sir?

A. Yes, I believe it was.

Q. And you went down in East St. Louis and had a hearing down there before an arbitrator, did you?

A. Yes.

Q. You were represented by Mr. Moran, were you?

A. Yes, sir.

Q. And you didn't contend in that hearing that you were a seaman, did you, sir?

A. I didn't know what it was in the first place, I don't know.

Q. And you subsequently had an award did you, from the arbitrator, got a decision?

A. I don't know whether I did or not; I don't think so.

Q. The matter is still pending before the Industrial Commission, isn't it?

A. I guess it is.

Q. You never dismissed it.

A. No, sir.

[fols. 348-370] Q. And did you in that proceeding make any complaint about any injury to your neck?

A. Sure.

Q. Sir?

A. Yes, sir.

Mr. Broderick: I think that's all. I wonder if I could have about a five minute recess.

Judge Lueders: We'll take a five minute recess.

(After recess.)

Mr. Broderick: The defendant rests and there's no rebuttal.

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Whereupon, a written Motion for Directed Verdict was submitted by defendant, said Motion being in words and figures as follows:

And now comes the defendant at the close of all the evidence introduced upon the trial of this cause and moves the Court to give the jury the following instruction, to-wit:

"The Court instructs the jury to find the Defendant not guilty."

(The above motion was *denied* by the Court.)

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[fol. 371]

INSTRUCTIONS BY THE COURT

THE FOLLOWING INSTRUCTIONS WERE GIVEN TO THE JURY AT THE REQUEST OF THE PLAINTIFF

The Court instructs the jury that if you find and believe from the preponderance of evidence that on the 5th day of November 1951, the plaintiff, Jacob Senko, was a member of the crew of the vessel "James Wilkinson" and that said vessel was on said date operating on navigable waters of the United States and if you further find and believe from the preponderance of the evidence, that the plaintiff, Jacob Senko, was injured while employed by the defendant, La-Crosse Dredging Company, and that the said injuries, if

any, resulted in whole or in part as a proximate result of the negligence as charged in the complaint, of any of the officers, agents or employees of said defendant, LaCrosse Dredging Company, your verdict should be in favor of the plaintiff.

Given.

[fol. 372] If you find from the greater weight of the evidence, and under the instructions of the Court, that the plaintiff is entitled to recover, then you should determine the amount of damages, if any, from the facts and circumstances proved by the evidence, pertaining to such damages. In doing so, you may take into consideration the nature and extent of the plaintiff's physical injuries, if any, which were the proximate result of the occurrence in question; his suffering in body and mind, if any, resulting from such physical injuries, if any; such future suffering and loss of health, if any, as he will sustain by reason of such injuries, if any; his loss of time and inability to work, if any, resulting from such injuries; and you may find for the plaintiff in such sum as will be fair compensation with respect to such of the foregoing elements which have been proved by the greater weight of the evidence.

Given.

[fol. 373] Where the instrumentality causing an injury is under the exclusive control of a defendant and is such an instrumentality as does not ordinarily involve injury, if those handling it exercise reasonable and ordinary care, the jury may infer from the happening of an accident that the happening was due to negligence. You are instructed that the jury may draw such an inference in this case, if such inference can be fairly drawn from all the facts and circumstances in evidence surrounding such happening. You are further instructed that the allowable inference under the doctrine of *res ipsa loquitur* is rebuttable, and that it is permissible for evidence to be offered by the defendant to show the degree of care which it actually exercised; whereupon, it is for the jury to decide whether a preponderance of the evidence, under all the proof, shows that the defendant exercised reasonable and ordinary care.

Given.

[fol. 374] THE FOLLOWING INSTRUCTIONS

WERE GIVEN TO THE JURY AT THE REQUEST OF THE DEFENDANT

The instructions now being given to you are the law of the case and must govern you in your deliberations. It is the right and the duty of the jury to determine all questions of fact. You must determine the facts from the evidence. The law of this case, as contained in these instructions, must be applied by you to the facts as you find them from the evidence. Neither by these instructions, nor by any ruling or remark made by the Court, during the course of the trial, did or does the Court mean to give any opinion on questions of fact. These instructions are to be considered by you as one connected series. You must not pick out any one individual instruction and disregard others, but you must take all of the instructions together as the law.

Instruction *given* to the jury.

[fol. 375] Only the Court has the power to decide what evidence is admissible. All references to evidence in these instructions mean only that evidence which the Court has admitted. Evidence which was offered but was not admitted by the Court, and evidence which was stricken out by the Court, must not receive any consideration from you.

Given.

If you find from the evidence, and under the instructions of the Court, that the plaintiff is not entitled to recover, then you will have no occasion to consider the question of damages.

Given.

[fol. 376] The Court instructs you that it is the duty of the Court to advise you what the law is applicable to this case, and it is your duty to follow the law given to you in these instructions, and it is also the duty of the Court to determine what evidence is admissible for your consideration, and you will disregard all evidence excluded or stricken from the record during the progress of the trial of this case, and you will give the same no consideration in arriving at your verdict.

Given.

You are not bound to believe something to be a fact simply because a witness has stated it to be a fact, if you believe from all the evidence that such witness is mistaken or has testified falsely concerning such alleged fact.

Given.

[fol. 377] Before you were accepted and sworn to act as jurors in this case you were questioned concerning your competency and qualifications to act as jurors. The parties to this case accepted you as jurors in reliance upon your answers to those questions. Those answers, which you then made to the said questions concerning your competency, qualifications, fairness, and freedom from prejudice and sympathy, were binding upon you then and remain binding upon you until you are finally discharged from further consideration of this case.

Given.

It is the right of an attorney to protect the interests of his client by objecting to the introduction of, or moving to strike out, evidence he deems improper, as well as to offer evidence he believes competent for admission. You must not be prejudiced against any party to this case because the attorney for such party may have made such objections or motions or offers, regardless of the Court's ruling thereon.

Given.

[fol. 378] In considering the evidence in this case you are not required to set aside your own observation and experience in the affairs of life but you have a right to consider all the evidence in the light of your own observation and experience in the affairs of life.

Given.

If you find that any statement in the testimony of any witness is inherently improbable when the same is considered in connection with all the evidence, then you may disregard such statement even in the absence of any evidence conflicting therewith.

Given.

The phrase, "a preponderance of the evidence", means the greater weight of the evidence, that is to say, such evi-

dence as when weighed with the evidence which is offered to oppose it has more convincing power in the minds of the jury.

Given.

[fol. 379] The jury are instructed that negligence is the omission to do something which a reasonable person, guided by those ordinary considerations which ordinarily regulate human affairs, would do or the doing of something which a prudent and reasonable person would not do. If you find and believe from the preponderance of greater weight of the evidence that the defendant, LaCrosse Dredging Corporation was not guilty of negligence then plaintiff cannot recover from defendant, LaCrosse Dredging Corporation, and you should by your verdict find the defendant, LaCrosse Dredging Corporation, not guilty.

Given.

You must not allow sympathy or prejudice to influence your verdict. Sympathy for the injuries of the plaintiff, if any, should not influence you in determining whether or not the defendant is liable, or if liable, affect in any way the amount of your verdict. Your verdict should be entirely free from the effect of sympathy, compassion or prejudice, and without regard to who is the plaintiff and who is the defendant.

Given.

[fol. 380]. The Court instructs the jury that a seaman within the meaning of the Jones Act includes only one who is a member of a crew of a vessel plying in navigable waters. The Court further instructs the jury that the essential and decisive elements of the definition of a "member of a crew" are that the vessel be in navigation; that there be a more or less permanent connection with the vessel and that the worker be aboard primarily to aid in navigation.

Given.

The jury should not understand by anything the Court has said during the progress of the trial or by anything contained in these instructions that the Court has any opinion or has expressed an opinion concerning the facts

in this case. In reading these instructions to you the Court does not intimate what, in the judgment of the Court, your verdict should be. It is the duty of the jury to find and determine the facts in this case from the evidence and having done so to apply to such facts the law as stated in these instructions. If counsel for either side in any opening statement or argument have made any statements which have not been supported by the evidence, it is your duty to ignore such statements and not be influenced by them in arriving at your verdict in this case.

Given.

[fol. 381] One way of impeaching a witness is by showing that the witness has made different and contradictory statements on the same point on a former occasion. If it appears from the evidence that any witness has been impeached in this manner, you have a right to take that into consideration in determining his credibility and the weight of his testimony.

Given.

The Court instructs the jury that a navigable body of water in law is one which is navigable in fact. It is navigable in fact when it is used, or is susceptible of being used, in its ordinary condition, as a highway for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water. Such a body of water constitutes a navigable water of the United States within the meaning of the Acts of Congress, in contradistinction from the navigable waters of the States, when it forms in its ordinary condition by itself, or by uniting with other waters, a continued highway over which commerce is or may be carried on with other States or foreign countries in the customary modes in which such commerce is conducted by water.

Given.

[fol. 382] The Court instructs the jury that you should not consider the question of damages in this case until you have first determined whether or not the defendant is liable for the loss and damage claimed by the plaintiff; and if you find from the evidence and under the instructions of the Court that the defendant is not liable to the plaintiff,

then you have no occasion at all to consider the question of damages. The fact that the Court has given you instructions on the subject of plaintiff's damage, if any, or that defendant's counsel has discussed such subject is not to be taken by you as any intimation on the part of the Court or any admission on the part of the defendant that the defendant is liable for loss or damage complained of by the plaintiff.

Given.

You are the judges of the credibility of the witnesses, and of the weight to be given to the testimony of each. You must receive and consider the testimony of each witness in the light of all the evidence, applying thereto the law as given to you in these instructions. You have a right to determine, from the appearance of the witnesses on the stand, from their manner of testifying, from their apparent candor and fairness, from their interest or lack of interest, if any, in the result of this case, from their apparent intelligence or lack of intelligence, and from all the other facts and circumstances proved on the trial, which witnesses are the more worthy of belief.

Given.

[fol. 383] The Court instructs the jury that if you find the issues in favor of the plaintiff, and also find from the preponderance of the evidence that the plaintiff, Jacob Senko, was guilty of negligence which contributed to his alleged injuries, then the plaintiff is not entitled to recover full damages, but only a diminished sum bearing the same relation to the full damages that the negligence attributable to the defendant bears to the negligence attributable to both the plaintiff and the defendant. In other words, the defendant is to be exonerated from a proportionate part of the damages corresponding to the amount of negligence attributable to the plaintiff.

Given.

The Court instructs the jury that if you find and believe from the preponderance or greater weight of the evidence that the plaintiff, Jacob Senko, was not a seaman within the meaning of the Jones Act, as defined in these instructions, then plaintiff cannot recover from the defendant and

you should find the defendant, LaCrosse Dredging Corporation, not guilty.

Given.

[fols. 384-400] The Court instructs the jury that if you find and believe from the preponderance or greater weight of the evidence that the dredge, James Wilkinson, was not being operated on navigable waters of the United States, as defined in these instructions, on November 5, 1951, then plaintiff cannot recover in this suit and you should, by your verdict, find the defendant, LaCrosse Dredging Corporation, not guilty.

Given.

In Weighing and considering the evidence, it is not the duty of the jury to discard and lay aside their common collective experience in life, but on the contrary it is the duty of the jury to use that experience in life in worldly affairs in weighing and considering the evidence.

Given.

The Court instructs the jury that the burden of proof is not upon the defendant to show that it was not guilty of the negligence charged against it, but the burden is upon the plaintiff to prove that the defendant was guilty thereof and this rule as to the burden of proof is binding in law and must govern the jury in deciding this case. The jury have no right to disregard said rule or adopt any other in lieu thereof but in weighing the evidence and coming to a verdict the jury should apply said rule and adhere strictly to it.

Given.

[fol. 401] DEFENDANT'S EXHIBIT B, 5-13-54, L. M.
STATE OF ILLINOIS

Industrial Commission
160 N. LaSalle Street
Chicago 1, Ill.
No. 481804

JACOB SENKO, Petitioner,
vs.

LA CROSSE DREDGING CORPORATION, Respondent

NOTICE OF DECISION OF ARBITRATOR

To Petitioner, Jacob Senko, Mt. Olive, Ill.

To Respondent, through W. O. Hoeffle, 945 Cotton Belt Bldg., St. Louis, Mo., Geo. J. Moran, 1930 State Street, Granite City, Ill.

Take notice, that on the 27th day of March, 1953, there was filed with the Industrial Commission, at Chicago, Illinois, the decision of the Arbitrator in the above entitled matter, a copy of which decision is enclosed to you herewith; and

You are further Notified that unless a petition for review is filed by you with the Industrial Commission within fifteen (15) days after receipt by you of this notice and copy of such decision, and an agreed statement of the facts appearing upon the hearing before the Arbitrator or a correct stenographic report of the proceedings at such hearing within twenty (20) days, then and in that event the decision of the said Arbitrator shall be entered of record by this Commission as the decision of the Industrial Commission.

Dated at Chicago, Illinois, this 31st day of March, 1953.
Industrial Commission of Illinois, By Bernard L.
Barasa, Secretary.

(Seal)

llj

The maximum fee to be charged by any attorney-at-law practicing before the Industrial Commission of Illinois shall not exceed twenty percent of the amount received in excess of undisputed temporary total compensation payments, unless further fees shall be allowed to said attorney upon a hearing fixing said fees.

In the event of all undisputed death cases, all undisputed amputation cases, all undisputed cases involving enucleation or 100% loss of vision of any eye or eyes, and all undisputed statutory permanent total disability cases, the legal fees, if any, for services rendered are to be fixed by the Industrial Commission of the State of Illinois.

The above rule applies to all hearings on arbitration, reviews or settlement contracts.

[fol. 401A]

STATE OF ILLINOIS

Before the Industrial Commission of Illinois

STATE OF ILLINOIS,

County of St. Clair, ss.:

No. 481804

JACOB SENKO, Petitioner,

vs.

LACROSSE DREDGING CORPORATION, Respondent
DECISION OF ARBITRATOR

Notice and application for adjustment of claim having been filed in the above entitled matter, and Thomas Q. Keefe having been designated by said Commission as Arbitrator thereof, and said matter having come on to be heard before said Arbitrator at City Hall in the City of East St. Louis, said County and State, on the 20th day of February, 1953 and prior thereto; and, after hearing the proofs and allegations of the parties hereto, and having made careful inquiry and investigation of said matter.

and being fully advised in the premises, said Arbitrator finds:

That on the 5th day of November, 1951, the respondent LaCrosse Dredging Corporation, was operating under and subject to the provisions of the Illinois Workmen's Compensation Act; that on said date the relationship of employee and employer existed between the petitioner Jacob Senko and said respondent; that on the date last above mentioned said petitioner sustained accidental injuries arising out of and in the course of the employment; and that notice of said accident was given said respondent within the time required under the provisions of said Act.

• That the earnings of the petitioner during the year next preceding the injury were \$3200.00 and that the average weekly wage was \$61.53.

That petitioner at time of injury was 66 years of age and had no children under 18 years of age.

That necessary first aid, medical, surgical and hospital services have been provided by the respondent herein.

That petitioner is entitled to have and receive from said respondent the sum of \$25.50 per week for a period of 14 5/7 weeks, that being the period of temporary total incapacity for work, for which compensation is payable.

That petitioner is entitled to have and receive from said respondent the sum of \$25.50 per week for a further period of 112 1/2 weeks, as provided in paragraph (e) of Section 8 of said Act, for the reason that the injuries sustained caused the 50% permanent loss of use of the right arm.

That the sum of \$357.00 has been paid on account of said injury.

That said petitioner is now entitled to have and receive from the respondent the sum of \$1402.50, being the amount of unpaid compensation that has accrued from the 5th day of November, 1951, to the 3rd day of March, 1953, the remainder of said award to be paid to said petitioner by said respondent in weekly payments, commencing one week from date last above mentioned.

Dated and entered this 27th day of March, 1953.

Thomas Q. Keefe, Arbitrator.

[fol. 402] IN THE CITY COURT OF GRANITE
CITY, ILLINOIS

[Title omitted]

DOCKET ENTRIES

On this 20th day of March, A. D. 1953, the same being one of the regular judicial days of this Court, upon motion the plaintiff, Paul Moore, a private person is by the Court appointed to serve the summons on the within named defendant and make return thereon.

On this 18th day of July, A. D. 1953, the same being one of the regular judicial days of this court, on motion of plaintiff, leave is given plaintiff to file an amended complaint on motion of plaintiff a rule is entered on said defendant to plead or answer said amended complaint within twenty days after the filing of plaintiff's amended complaint.

On this 18th day of September, A. D. 1953, the same being one of the regular judicial days of this Court and this cause coming on to be heard on motion of Plaintiff it is ordered that the defendant file with the Clerk of this Court, a sworn list of documents etc. said motion heretoford filed on September 18th, 1953, Motion allowed.

On this 30th day of September, A. D. 1953, the same being one of the regular judicial days of this Court and this cause [fol. 403] coming on to be heard upon defendant's motion to dismiss or in the alternative to strike and make more definite and certain, after argument of counsel and due deliberation by the Court, said motion is overruled and denied, Rule on the defendant to answer by Monday, October 12th 1953. On motion of plaintiff Count IV of Amended Complaint dismissed.

On this 3rd day of November, A. D. 1953, the same being one of the regular judicial days of this Court on motion of plaintiff, leave is given plaintiff to amend his complaint by filing an addition count, same filed and on motion of plaintiff a rule is entered on the defendant to plead by November 20th, 1953.

On this 4th day of November, A. D. 1953, the same being

one of the regular judicial days of this Court and this cause coming to be heard upon defendant's motion and affidavit to strike said cause from the setting of November 9th, 1953, after argument of counsel, and the Court being fully advised and satisfied in the premises; it is ordered, that this cause may be and the same is hereby stricken from the Setting of November 9th 1953; And it is further ordered that the Clerk of this Court reset this case for trial on the next setting of cases to be tried by jury,

On this 10th day of May, A. D. 1954, the same being one of the regular judicial days of this Court and this cause coming on to be heard on defendant's motion for judgment on the pleadings, after argument of counsel and due deliberation by the Court, said motion is overruled and motion denied, and this cause now being called for trial, come the parties to this suit by their attorneys respectively and issues being joined it is ordered that a jury come, whereupon come the jurors of a jury of good and lawful men and women to-wit: Julia Sikovick, Violet Koenig, [fol. 404] Olive Sigite, Henrietta Mitchell, Elsie Leonora Rains, Sue Thomas, Harold R. Gwin, Mertie Baker, Dorothy M. Handler, Charles Merris, Margaret C. Noonan and T. P. Reilly who being duly elected tried and sworn well and truly to try the issues joined herein and a true verdict render according to the evidence opening statements of Attorneys made to the jury, witnesses sworn; and the hour of adjournment having arrived it is ordered that said jury be permitted to separate until Nine Thirty (9:30) o'clock to-morrow morning.

On this 11th day of May, A. D. 1954, the same being one of the regular judicial days of this Court, again come the parties to this suit by their attorneys respectively and the jury heretofore empaneled herein for the trial of said cause also come plaintiff's evidence resumed, and the hour of adjournment having arrived it is ordered that said jury be permitted to separate until Nine-Thirty (9:30) to-morrow morning.

On this 12th day of May, A. D. 1954, the same being one of the regular judicial days of this court, again come the parties to this suit by their attorneys respectively and the jury heretofore empaneled herein for the hearing of said

cause also come; trial resumes, Plaintiff rests; at the close of plaintiff's evidence, defendant moves for directed verdict by written motion after argument of counsel and due deliberation by the Court, defendant's said motion allowed as to Counts, II, III and V, and overruled and denied as to Count I, and the hour of adjournment having arrived it is ordered that said Jury be permitted to separate until Nine-Thirty (9:30) to-morrow morning.

[fol. 405] On this 13th day of May, A. D. 1954, the same being one of the regular judicial days of this Court, again come the parties to this suit by their attorneys respectively and the Jury heretofore empaneled herein for the hearing of said cause also come, evidence on behalf of the defendant heard, Defendant rests, plaintiff offers no evidence in rebuttal, closing argument of counsel; jury instructed and retire to consider their verdict in the custody of the sworn bailiffs of this Court, and the hour of adjournment having arrived by agreement of the parties hereto it is ordered that when said jury shall have agreed upon their verdict they shall sign and seal the same and be permitted to separate until nine-thirty (9:30) to-morrow morning.

On this 14th day of May, A. D. 1954, the same being one of the regular judicial days of this Court, Sealed verdict of the Jury is opened in open Court, said verdict being as follows: "We the jury find the issues in favor of the plaintiff and assess plaintiff's damages at \$30,000.00 Dollars said verdict signed by all the jurors."

On this 3rd day of January, A. D. 1955, the same being one of the regular judicial days of of this Court Defendant's motion for judgment notwithstanding the verdict and in the alternative for a new trial having been heretofore argued, and briefs submitted and the same having been taken under advisement by the Court, and the Court now being fully advised and satisfied in the premises, overrules defendant's motion for judgment notwithstanding the verdict. The Court further orders and directs plaintiff to enter a remittitur of \$10,000.00 dollars to the verdict of the jury and it is further ordered that if said plaintiff [fol. 406] fails to enter such remittitur within ten days (10) from the date of this Order, then a new trial will be granted.

On this 11th day of January, A. D. 1955, the same being one of the regular judicial days of this court, comes the said plaintiff by his attorney, and in compliance with an order of Court heretofore entered in this cause said attorney makes a remittitur of Ten Thousand (\$10,000.00) Dollars from the amount of the verdict heretofore rendered by the Jury as aforesaid motion for a new trial is overruled and a new trial denied.

Therefore it is considered by the Court, that the Plaintiff, Jacob Senko do have and recover of and from the defendant, LaCrosse Dredging Corporation, a corporation the sum of Twenty Thousand (\$20,000.00) Dollars being the residue of the amount of the damages in form as aforesaid by the Jury assessed together with his costs and charges in this behalf expended and have execution therefor.

On this 11th day of January, A. D. 1955, the same being one of the regular judicial days of this Court, sum of the appeal bond is fixed at Twenty-Five Thousand (\$25,000.00) Dollars.

On this 31st day of January, A. D. 1955, the same being one of the regular judicial days of this Court, Defendant files it's Notice of appeal together with receipt of opposing counsel of a copy of the same.

On this 8th day of February, A. D. 1955, the same being one of the regular judicial days of this Court, Defendant files its motion for supersedeas, its notice of its intention to file appeal bond with receipt of opposing Counsel (Counsel), its praecipe for record with the acknowledgment, of re-[fol. 407] ceipt of a true copy thereof by attorney for plaintiff, together with a written order of the Court granting the said supersedeas and approving the appeal bond.

[fol. 408] [File endorsement omitted.]

IN THE CITY COURT OF GRANITE CITY, ILLINOIS

[Title omitted]

MOTION OF DEFENDANT FOR JUDGMENT NOTWITHSTANDING
THE VERDICT AND IN THE ALTERNATIVE FOR A NEW TRIAL—
Filed May 29, 1954

Defendant, LaCrosse Dredging Corporation, a corporation, by Pope and Driemeyer, its attorneys, moves the Court for judgment against the plaintiff in bar of suit notwithstanding the verdict of the jury in this cause, for the following reasons:

1. The written motion of defendant for judgment on the pleadings filed and presented, prior to the commencement of the trial of this case, should have been granted by the Court, and should now be granted.

2. The written motion to direct a verdict for the defendant and the written motion to direct a verdict for the defendant as to Count I of plaintiff's amended complaint, which were offered at the close of all of the evidence offered on behalf of the plaintiff in this cause should have been granted by the Court and should now be granted.

[fol. 409] 3. The written motion to direct a verdict for the defendant, and the written motion to direct a verdict for the defendant as to Count I of plaintiff's amended complaint which were offered at the close of all of the evidence offered upon the trial of this cause should have been granted by the Court and should now be granted.

4. No evidence sufficient to prove the material averments of plaintiff's amended complaint was presented upon the trial of this cause.

5. Plaintiff failed to prove a cause of action against defendant on the trial of this cause.

6. No cause of action exists in favor of plaintiff against defendant under the proof shown by the evidence heard upon the trial of this cause, and judgment for defendant notwithstanding the verdict of the jury in this cause should be entered.

7. The pleadings and the evidence heard upon the trial of this cause show that there is another action pending between plaintiff and defendant for the same cause, which action was commenced prior to the filing of this suit.

8. Other good and sufficient reasons to be urged upon the argument of this motion.

In the alternative, and without prejudice to the foregoing motion for judgment notwithstanding the verdict, defendant moves the Court to set aside the verdict of the jury and to grant a new trial herein, and for grounds for said motion shows to the Court the following reasons:

1. The verdict is contrary to the law.

2. The verdict is contrary to the evidence.

[fol. 410] 3. The verdict was the result of passion and prejudice and was not the result of due consideration of the evidence and the Court's instructions.

4. The verdict of the jury is grossly excessive in amount.

5. The verdict of the jury is so grossly excessive in amount as to clearly evince a misunderstanding on the part of the jury as to the measure and element of damages properly warranted by the evidence under the instructions of the Court.

6. There is no sufficient or substantial evidence tending to support the amount of the jury's verdict.

7. The Court erred in refusing to give to the jury the peremptory instructions requested by the defendant at the close of all the evidence introduced on behalf of the plaintiff upon the trial of this cause to find the defendant not guilty, and to find the defendant not guilty as to Count 1 of plaintiff's amended complaint.

8. The Court erred in refusing to give to the jury the peremptory instructions requested by the defendant at the close of all the evidence introduced upon the trial of this cause to find the defendant not guilty, and to find the defendant not guilty as to Count 1 of plaintiff's amended complaint.

9. The Court erred in admitting improper evidence on behalf of the plaintiff and in refusing to strike improper evidence admitted on behalf of the plaintiff and in refusing to admit proper evidence offered on behalf of the defendant.

10. Plaintiff failed to prove his case by a preponderance of the evidence, and the verdict of the jury was contrary to the preponderance of the evidence.

[fol. 411] 11. The verdict of the jury was contrary to the manifest weight of the evidence.

12. The Court erred in giving the jury the following instruction tendered by plaintiff, which instruction was erroneous and highly prejudicial to defendant, in as much as said instruction improperly and erroneously defined the rule of law which it purported to announce and improperly and erroneously advised the jury to apply a rule of law not applicable to the facts in this case, and for other good and sufficient reasons to be urged upon the presentation of this motion;

“Where the instrumentality causing an injury is under the exclusive control of a defendant and is such an instrumentality as does not ordinarily involve injury, if those handling it exercise reasonable and ordinary care, the jury may infer from the happening of an accident that the happening was due to negligence. You are instructed that the jury may draw such an inference in this case, if such inference can be fairly drawn from all the facts and circumstances in evidence surrounding such happening. You are further instructed that the allowable inference under the doctrine of *res ipsa loquitur* is rebuttable, and that it is permissible for evidence to be offered by the defendant to show the degree of care which actually exercised, whereupon it is for the jury to decide whether a preponderance of the evidence, under all the proof, shows that the defendant exercises reasonable and ordinary care,”

13. The Court further erred in giving the following instruction tendered by plaintiff, which instruction was erroneous and highly prejudicial to the defendant for reasons among others, that it refers to negligence as charged in the complaint, without in any manner defining either in this instruction, or in any other instruction, what negligence it is which was charged, fails to define either in this instruction, or in any other instruction, what is meant by

proximate result, and fails to limit the negligence of the officers, agents or employees of the defendant to negligence committed while said officers, agents or employees of defendant were acting within the scope of such employment as they may have had with defendant, and for other good and sufficient reasons to be urged upon the presentation of [fols. 412-414] this motion:

"The Court instruct the jury that if you find and believe from the preponderance of the evidence that on the 5th day of November, 1951, the plaintiff, Jacob Senko, was a member of the crew of the vessel "James Wilkinson" and that vessel was on said date operating on navigable waters of the United States, and if you further find and believe from preponderance of the evidence, that the plaintiff, Jacob Senko, was injured while employed by the defendant, LaCross Dredging Company, and that the said injuries, if any, resulted in whole or in part as a proximate result of the negligence as charged in the complaint, of any of the officers, agents or employees of said defendant, LaCrosse Dredging Company, your verdict should be in favor of the plaintiff."

14. The Court further erred in giving the jury the following instruction tendered by plaintiff, which instruction was erroneous and highly prejudicial to defendant for reasons among others that it directed the jury to take into consideration elements of damage not proved or supported by competent or proper evidence and failed to limit the jury's consideration of plaintiff's injuries and damages, to such as were alleged and charged in plaintiff's amended complaint, and for other good and sufficient reasons to be urged upon the presentation of this motion:

"If you find from the greater weight of the evidence and under the instruction of the Court, that the plaintiff is entitled to recover, then you should determine the amount of damages, if any, from the facts and circumstances proved by the evidence, pertaining to such damages, in doing so, you may take into consideration the nature and extent of the plaintiff's physical

injuries, if any, which were the proximate result of the occurrence in question; his suffering in body and mind, if any, resulting from such physical injuries, if any, such future suffering and loss of health, if any, as he will sustain by reason of such injuries, if any; his loss of time and inability to work, if any, resulting from such injuries; and you may find for the plaintiff in such sum as will be fair compensation with respect to such of the foregoing elements which have been proved by the greater weight of the evidence."

15. Other good and sufficient reasons to be urged and argued upon the presentation of this motion.

LaCrosse Dredging Corporation, By Pope and Driemeyer, His Attorneys.

Pope and Driemeyer, 322 First National Bank Building, East St. Louis, Illinois.

[fol. 415] [File endorsement omitted.]

IN THE CITY COURT OF GRANITE CITY, ILLINOIS

[Title omitted]

NOTICE OF FILING OF NOTICE OF APPEAL—Filed January 30, 1955

To: Jacob Senko and George J. Moran and William L. Beatty, his attorneys of record:

Pleas- take notice that attached hereto is a true copy of the notice of appeal from the judgment of the City Court of Granite City, Illinois, entered in this cause on the 11th day of January, 1955, to the Appellate Court of Illinois for the Fourth District which was filed in the office of the Clerk of the City Court of Granite City, Illinois, on the 31st day of January, 1955.

LaCrosse Dredging Corporation, a corporation, Defendant Appellant, By Pope & Driemeyer, Its Attorneys.

Pope and Driemeyer, 322 First National Bank Building, East St. Louis, Illinois, Attorneys for LaCrosse Dredging Corporation, a corporation, Defendant-Appellant.

Received the Notice of which the above and foregoing is a true copy, and a true copy of the notice of appeal hereto annexed this 31st day of January, 1955.

George J. Moran, William L. Beatty, Attorneys of record for Jacob Senko, Plaintiff-Appellee.

[fol. 416] IN THE CITY COURT OF GRANITE CITY, ILLINOIS

[Title omitted]

NOTICE OF APPEAL—Filed January 30, 1955

To: Jacob Senko and George J. Moran and William L. Beatty, his attorneys.

I

LaCrosse Dredging Corporation, a corporation, defendant-appellant above named, hereby appeals to the Appellate Court of Illinois for the Fourth District, from the final judgment entered in this cause on the 11th day of January, 1955, whereby it was adjudged that the plaintiff, Jacob Senko, have and recover of and from the defendant, LaCrosse Dredging Corporation, a corporation, the sum of \$20,000.00 and costs of suit.

II

Appellant prays that said judgment be reversed and that judgment shall be entered and ordered by the Appellate Court in favor of appellant, LaCrosse Dredging Corporation, a corporation, and further prays in the event the Appellate Court shall be of the opinion that the judgment of the Trial Court should not be reversed and judgment [fols. 417-425] entered in favor of Appellant, LaCrosse Dredging Corporation, a corporation, then and in such case, the said judgment may be reversed and a new trial granted.

Dated January 27, 1955.

LaCrosse Dredging Corporation, a corporation, Defendant-Appellant, By Pope and Driemeyer, Its Attorneys.

Pope and Driemeyer, 322 First National Bank Building,
East St. Louis, Illinois, Attorneys for Defendant-Appel-
lant; LaCrosse Dredging Corporation, a corporation.
Acknowledgment of service (omitted in printing.)

[fols. 426-435] [File endorsement omitted.]

IN THE CITY COURT OF GRANITE CITY, ILLINOIS
Law No. 6563
STATE OF ILLINOIS,
County of Madison, ss:

JACOB SENKO, Plaintiff,
vs.

LACROSSE DREDGING COMPANY, Defendant

REMITTITUR—Filed January 10, 1955

Now comes Jacob Senko by George J. Moran his attorney, and pursuant to the order of the Court entered in the above entitled cause on January 3, 1955 hereby remits the sum of Ten Thousand Dollars (\$10,000.00) from the verdict of the jury in the above entitled cause.

Signed Jacob Senko, by George J. Moran, his attorney.

[fol. 436] [File endorsement omitted.]

IN THE APPELLATE COURT OF ILLINOIS FOURTH DISTRICT
MAY TERM, 1955

Appeal from the City Court of Granite City, Illinois.
JACOB SENKO, Plaintiff-Appellee,

vs.

LACROSSE DREDGING CORPORATION, Defendant-Appellant
Honorable Wesley Lueders, Judge Presiding.

OPINION—October 3, 1955

SCHEINEMAN, J.

Jacob Senko brought this suit against his employer, LaCrosse Dredging Corporation, claiming that he had

suffered personal injuries through the negligence of said employer. After a jury verdict of \$30,000 for plaintiff, the trial court required a remittitur and entered judgment for \$20,000. The defendant's motion for judgment and for new trial were both denied.

The suit was filed under the provisions of Section 33 of the Merchant Marine Act of 1920, commonly known as the Jones Act, 46 U. S. C. A. Sec. 688. In substance, the Jones Act provides that seamen on vessels operating in navigable [fol. 437] waters, who are injured in the course of their employment, shall have the same rights and remedies at law, which appertain to railway employees under other federal statutes. Questions presented on this appeal require a full statement of facts, and a review of the legislative and judicial background of the statute, since it is an unusual type of case in a state court.

Defendant operated a dredge on which plaintiff was employed. At the request of a labor union, defendant had erected a shed on land near its dredging operations, equipped with benches and a stove, so that, during off-duty intervals, the workmen would have a place to warm themselves and obtain shelter. The incident in question occurred in or near this shed on November 5, 1951.

About 10:45 P. M. plaintiff came from the dredge to the shed, where he heard another employee (the assistant superintendent) say that he would put some coal on the fire. This was done by removing a stove lid, picking up a coal bucket, and emptying the contents in the stove. Apparently plaintiff did not actually see the operation, but the fire flared up with a great flash and both men ran out, colliding at the doorway and falling. Or perhaps plaintiff was just approaching the door from outside and was [fol. 438] met by the running man. Plaintiff was somewhat vague as to the details, but anyway, he fell. He claims severe injuries resulted to him.

It is plaintiff's theory that he is a seaman under the Jones Act, that there must have been something other than coal in the bucket to cause the flash, that he has not attempted to prove specific acts of negligence, but defendant should be held liable under the doctrine of *res ipsa loquitur*.

Defendant contends it is entitled to a directed verdict

because: 1, plaintiff was not a member of a crew of seamen and is not under the Jones Act; 2, the dredge was not operating in navigable waters; and 3, there was no evidence of negligence on its part and no basis to apply the doctrine of *res ipsa loquitur*.

From examination of the abstract and briefs, we find no dispute as to the facts material to the first defense. It appears that, prior to plaintiff's said employment, the dredging equipment had been brought to the site by a tug, during which ~~movement~~, the crew of the tug managed the dredge and provided it with navigation lights. The dredge was anchored about 15 feet from shore in Gabaret Chute, [fol. 439] which is a slough connected with the Mississippi, the purpose being to dredge out a by-pass around a rocky section of the river, through the slough to a canal connected to the river at another point.

The dredge consisted of a scow or barge upon which was mounted dredging machinery, pumps, dynamo, etc. It operated day and night, so that it had a lighting system, including the white mooring lights required on stationary objects. A pipe ran from the barge to the shore, through which excavated material was pumped and disposed of. The pipe rested on pontoons, and this formed a walk, with handrail, by which the men could come and go. There was also a rowboat, but the distance from shore was too short to row, so in using the boat, it was simply given a push to move it the few feet.

The dredge had arms or poles called "spuds" which pushed into the bottom and held the position, and there were also cables to the shore for additional anchorage. The barge could be moved slowly by operating the spuds in a walking fashion, also by winding the cables on a winch. Other than these contacts with the ground the barge had no means of locomotion.

[fol. 440] Dredging operations were conducted by four men aboard, an operator, an engineer, an oiler, and plaintiff. Defendant did not furnish meals or sleeping quarters, all the men lived ashore, worked eight hour shifts, were paid by the hour, and plaintiff drove back and forth daily from his home some 40 miles distant. Of the four men, the first three were members of a building crafts union, and plaintiff was a member of the Common Laborer's

Union at Mt. Olive. He secured this employment through the union hall at Granite City, and all four men had union permits to work at this particular site.

According to a witness permitted to testify as to the usual duties of a laborer or deckhand on a dredge, the duties were to clean the deck, also the navigation lights, and to take soundings when the barge was in motion. However, these items were not pertinent to the plaintiff, for there were no navigation lights on the dredge, and he had taken soundings only for the purpose of noting the depth of the cut. He had nothing to do with moving the barge and testified he had never been aboard when it was moved. He gave as his main duties the delivery of supplies and proper storage thereof, bringing them when needed, and sometimes taking things ashore where other men were [fol. 441] working at earth moving.

From the foregoing, it is apparent that, by any ordinary test, the plaintiff would not classify as a seaman. However, the courts have enlarged the meaning of the term. It was often said that a seaman aiding in navigation was not limited to those who can "hand, reef and steer." Thus it was easy to include all those who customarily traveled with a vessel in its movements, such as a cook, a clerk, a stewardess, etc. But the broadening of the definition continued, until it came to include practically any workman whose duties required him to set foot on a ship at any time or place. Thus, longshoremen were designated as seamen, although they worked only at loading or unloading a vessel tied at the docks.

A longshoreman injured in the course of his duties on land would normally come under the state's workmen's compensation act, but if the injury occurred on the vessel while it was in navigable waters, the state law could not apply, for the federal law had jurisdiction. These men were given some remedy by calling them seamen under the Jones Act.

Men who ply the seas, with its hazards, rigors and isolation, have long been regarded as wards of the court in admiralty, and this solicitude has been applied in courts [fol. 442] of law. Men who board the ship only in the safety of a harbor, who work only an eight hour shift thereon, who return to their families daily, and sleep in the

comfort and security of their own beds every night are not in exactly the same position. Congress proceeded to enact new legislation, which was, in substance, a compensation act.

Possibly the men involved had something to do with the new legislation, since they were in position to observe the operation of both types of laws. The new law enacted by congress, known as the Longshoremen's and Harbor Workers Compensation Act, 33 U. S. C. A. Sec. 902 (1927), is patterned after prior compensation acts, provides recovery for personal injury in line of duty regardless of absence of negligence and makes the remedy limited and exclusive.

The legislative history of this act is reviewed in *South Chicago Coal and Dock Co. v. Bassett*, 309 U. S. 251, 60 S. Ct. 544, 84 L. Ed. 732. It appears that ships' masters and crews preferred to remain under the Jones Act; accordingly, a provision was inserted in the new act excluding "seamen". Obviously, under the prevailing definition of that word, practically everybody that congress intended to include, would have been excluded. As finally passed, the [fol. 443] words "master or member of a crew" were substituted for "seamen." The Supreme Court held the purpose was,

"to provide compensation for a class of employees at work on a vessel in navigable waters who, although they might be classed as seamen, were still regarded as distinct from members of a "crew." They were persons serving on vessels, to be sure, but their service was that of laborers, of the sort performed by longshoremen and harbor workers and thus distinguished from those employees on the vessel who are naturally and primarily on board to aid in her navigation."

In the above case the man involved had the primary duty of loading coal on vessels in harbor, but he was aboard the fueling vessel when it was in motion, he was called a "deck-hand" and occasionally had incidental duties in connection therewith, such as throwing a ship's rope or making the boat fast. The court attached no significance to his title and held these were duties which could readily be performed or aided by a harbor worker, and that he came

under the compensation act, rather than the Jones Act, observing:

“that the primary duty of the decedent was to facilitate the flow of coal to the vessel being fueled, that he had no duties while the boat was in motion, that he slept at home and boarded off ship and was called each day as he was needed. Workers of that sort on harbor craft may appropriately be regarded as ‘in the position of longshoremen or other casual workers on the water.’ ”

The legislative history of these acts and the interpretation thereof was repeated in *Swanson v. Marra Bros.*, (1946) 328 U. S. 1, 66 S. Ct. 869, 90 L. Ed. 1045. The man involved was engaged in loading cargo onto a vessel in Philadelphia harbor, and he was struck by a liferaft falling therefrom while he was on the pier. The suit was brought under the Jones Act and was dismissed by the trial court. The decision was affirmed on intermediate and final appeals. The Supreme Court recognized that the suit would have been proper under the Jones Act according to its own decisions prior to the passage of the Longshoremen's Act of 1927, making particular reference to *International Stevedoring Co. v. Haverty*, 272 U. S. 50, 47 S. Ct. 19, 71 L. Ed. 157, decided only six months before passage of the new statute. The court ruled:

“We must take it that the effect of these provisions of the Longshoremen's Act is to confine the benefits of the Jones Act to members of the crew plying in navigable waters and to substitute for the right of recovery, recognized by the *Haverty* case, only such rights to compensation as are given by the Longshoremen's Act.”

Other cases on the subject are similar in effect, see particularly, *Walling v. Bay State Dredging Co.*, 149 F. 2d 346, 161 ALR 825, Cere. Den. 326 U. S. 760, 66 S. Ct. 440, 90 L. Ed. 140.

This court therefore holds as a general proposition: an employee whose principal duty is to load supplies on a [fol. 445] vessel at anchor, and to perform incidental tasks

of a common labor character, and who is not naturally and primarily on board to aid in navigation, cannot maintain an action under the Jones Act.

Further, as to this particular case: it being undisputed that plaintiff lived and boarded ashore; worked the hours of laborers only, was paid by the hour, had the primary duty of loading material and supplies on board, or unloading them, and of performing various other incidental common labor tasks, and who was not employed for nor used in the movement of the vessel from place to place, and was not aboard except when the vessel was anchored, he cannot maintain an action under the Jones Act.

Further, that the provision of law making the compensation act the *exclusive* remedy of employees on vessels other than the master and members of the crew, is binding on the court, and cannot be evaded by asserting that a jury's notion of what law should be applied nullifies that provision, where there is no substantial dispute as to the relevant facts.

Cases which plaintiff contends are contrary to the foregoing holding have been considered by this court, particularly the Circuit Court cases upholding verdicts under the Jones Act, namely, *Gahagan Const. Corp. v. Armao*, 165 Fed. 2nd 301; *Kibadeaux v. Standard Dredging Co.*, 81 Fed. 2nd 670; *McKie v. Diamond Marine Co.*, 204 Fed. 2nd 132; *Maryland Cas. Co. v. Lawson*, 94 Fed. 2nd 190; *Wilkes v. Mississippi River Sand and Gravel Co.* 202 Fed. 2nd 383.

These cases cannot be regarded as in point, for the reason that they all involve employees who customarily accompanied the vessel on its voyages, whether extended or daily. This court does not hold that members of the crew or those aiding in navigation consist only of those who "hand, reef and steer." It is to be doubted employees who sign on for a voyage are excluded from the Jones Act, whether they be cooks or sometimes laborers.

Possibly phrases can be plucked from these opinions as indicating a tendency to broaden the definition of "crew" or of "aiding in navigation," but there will necessarily be close cases of employees traveling with the vessel. In the *Gahagan* case the plaintiff ate and slept on board on

a trip from New York to Boston, worked out in the sea harbor when the tide permitted, and had some regular duties of a maritime nature.

[fol. 447] In the Kibadeaux case the vessel went from port to port around the entire coast, and plaintiff was paid on a semi-monthly basis, like other members of the crew. The McKie case, by a divided court, involved a dredge which traveled about in Tabb's Bay off the Texas coast, and plaintiff worked at whatever travel there was by the vessel. In the Maryland Casualty Co. case the plaintiff was actually a common laborer, but he necessarily went to sea with the outfit, ate and slept aboard, making more or less regular runs with the crew. In the Wilkes case the court noted that the plaintiff had a permanent connection with the vessel such as to expose him to the same hazards of marine service as those shared by all aboard.

Whether these cases should be regarded as close or as encroaching on enacted legislation is immaterial, they do not apply to a plaintiff employed under a union permit to perform common labor on a local project, and whose duties are performed while the outfit is securely attached to the ground.

Since the plaintiff is not under the Jones Act, it is unnecessary for this court to pass upon other points raised. [fol. 448] In conclusion, it may be observed that plaintiff is not without remedy. The injuries occurred on land, so that the case is not confined to federal jurisdiction. The record discloses that plaintiff actually filed a claim with the Illinois Industrial Commission, and at a proceeding before its designated hearing officer plaintiff and defendant stipulated they were under the Illinois Compensation Act and that defendant had made payments thereunder including medical and hospital expenses, and 14 weeks temporary and total disability compensation. We did not deem it necessary to make this any part of the decision herein.

For the reasons given, the judgment is reversed.

Judgment Reversed.

Bardens, P. J., and Culbertson, J., concur.

Publish in Full.

[fol. 449] IN THE APPELLATE COURT OF ILLINOIS,
FOURTH DISTRICT

Present: Hon. William M. Bardens, Presiding Justice.
Hon. A. J. Scheineman, Justice. Hon. John T. Culbert-
son, Jr., Justice. David F. Mallett, Clerk.

And afterwards, to-wit: On the 3rd day of October, in
the year of our Lord one thousand nine hundred and fifty-
five, an order was made by said Court in words and figures
following, to-wit:

No. 55 M 21

MAY TERM, 1955

Appeal from City Court of the City of Granite City,
Madison County.

JACOB SENKO, Plaintiff-Appellee,

vs.

LACROSSE DREDGING CORPORATION, Defendant-Appellant
JUDGMENT—October 3, 1955

On this day come again the said parties, and the Court
having diligently examined and inspected as well the rec-
ord and proceedings, aforesaid, as the matters and things
therein assigned for error and being now sufficiently ad-
vised of and concerning the premises, are of opinion that in
the record and proceedings aforesaid, and in the rendition
of the judgment aforesaid there is Manifest Error in this:
as set forth in opinion filed.

Therefore, It is considered by the Court, that, for that
error, and others in the record and proceedings aforesaid,
the judgment of the City Court of Granite City, in this
behalf rendered, be reversed, annulled, set aside, and
wholly for nothing esteemed. And it is further considered

by the Court, that the said Appellant recover of and from the said Appellee cost by it in this behalf expended, and that Appellant have execution therefor.

[fols. 450-451] IN SUPREME COURT OF ILLINOIS

6563

55 M-21

Petition for Leave to Appeal from Appellate Court,
Fourth District.

No. 33878

JACOB SENKO, Petitioner,

vs.

LA CROSSE DREDGING CORPORATION, Respondent

ORDER DENYING LEAVE TO APPEAL—January 13, 1956

And now on this day the Court having duly considered the Petition for Leave to Appeal herein as well as the record and abstract, filed in support thereof, and being now fully advised of and concerning the premises, doth overrule the prayer of the petition and denies Leave to Appeal herein.

And it is further considered by the Court that the said Respondent recover of and from the said Petitioner costs by it in this behalf expended, to be taxed, and that it have execution therefor.

Clerk's Certificate to foregoing paper omitted in printing.

[File endorsement omitted.]

[fol. 452] SUPREME COURT OF THE UNITED
STATES

[Title omitted]

ORDER ALLOWING CERTIORARI—Filed May 28, 1956

The petition herein for a writ of certiorari to the Appellate Court of the State of Illinois, Fourth District, is granted, and the case is transferred to the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(1140-3)

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**IN THE
SUPREME COURT OF THE UNITED STATES.**

OCTOBER TERM, 1955

No. **858**

JACOB SENKO,
Petitioner,

vs.

LaCROSSE DREDGING CORPORATION,
Respondent.

**PETITION FOR A WRIT OF CERTIORARI
To the Fourth District Appellate Court
of the State of Illinois.**

STANLEY M. ROSENBLUM,
408 Olive Street,
St. Louis 2, Missouri,
Attorney for Petitioner.

Of Counsel:

GEORGE J. MORAN,
WILLIAM L. BEATTY,
1930 State Street,
Granite City, Illinois.

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IN THE
SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1955.

No.

JACOB SENKO,
Petitioner,

vs.

LaCROSSE DREDGING CORPORATION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the Fourth District Appellate Court
of the State of Illinois.

To the Honorable, the Chief Justice and Associate Justices
of the Supreme Court of the United States:

Jacob Senko respectfully petitions that a Writ of Certiorari issue to review the judgment of the Fourth District Appellate Court of the State of Illinois, which became final on the 13th day of January, 1956.

OPINION BELOW.

The opinion of the Fourth District Appellate Court of Illinois is reported in 7 Ill. App. 2nd 307, 129 N. E. 2nd 454, and a copy thereof may be found as an appendix to this petition. The Supreme Court of Illinois denied leave to appeal without written opinion (S. C. R. 169).

"The admiralty and maritime jurisdiction of the United States shall extend to and include all cases of damage or injury, to person or property, caused by a vessel on navigable water, notwithstanding that such damage or injury be done or consummated on land.

"In any such case suit may be brought in rem or in personam according to the principles of law and the rules of practice obtaining in cases where the injury or damage has been done and consummated on navigable water; Provided, that as to any suit against the United States for damage or injury done or consummated on land by a vessel on navigable waters, the Public Vessels Act or Suits in Admiralty Act, as appropriate, shall constitute the exclusive remedy for all causes of action arising after June 19, 1948 and for all causes of action where suit has not been hitherto filed under the Federal Tort Claims Act: Provided further, that no suit shall be filed against the United States until there shall have expired a period of six months after the claim has been presented in writing to the Federal agency owning or operating the vessel causing the injury or damage." June 19, 1948, c. 526, 62 Stat. 496; 46 U. S. C. A., Sec. 740.

STATEMENT OF THE CASE.

In 1946 the U. S. Army Corps of Engineers, through various contractors and subcontractors, including the respondent, LaCrosse Dredging Corporation, commenced construction on the Chain of Rocks Canal Project (Abs. 41). The canal, which bypasses a treacherous rocky section of the main river channel, was part of a long range over-all plan to make the river more navigable as a whole (Abs. 41, 53).

The canal, as designed, ran generally north and south from a point in the river north of Hartford, Illinois, to a point in the river near Venice, Illinois. Included as a part of the canal was a lock known as Lock No. 27, which was located at a place about one-mile north of the southerly end of the canal (Abs. 41). South of Lock 27 and for a portion of its length north thereof, the canal followed old Gabaret Chute, a slough which had run more or less parallel to and connecting at both ends with the Mississippi River (Abs. 41, 60, 61). In past years this chute had been used for swimming and boating. It had also been used commercially by boats and barges hauling mules, coal wagons and other livestock from the mainland to Gabaret Island. A ferry had been operated across the chute from the mainland to Gabaret Island, but this ferry had been discontinued prior to the time construction began on the canal (Abs. 28, 61, 63, 84, 85).

In 1947, when respondent began its dredging operation on the south part of the canal, it came up Gabaret Chute from the river widening and deepening the canal as it moved north (Abs. 36, 41, 115). Among the dredges owned and operated by respondent was the "James Wilkinson." Built by the St. Louis Shipyards, it was 136 feet long and 36 feet wide with a draft of 5½ feet. Like all dredges, its principal equipment consisted of a large pump driven by a Diesel motor. It also had auxiliary motors used to operate its generating plant, winches and the "spuds" at the rear of the dredge (Abs. 116, 119).

Some time late in 1950 or early 1951 the James Wilkinson was brought up the south part of the canal by dredge tenders, and on November 5, 1951, was operating near the south end of Lock 27 (Abs. 80, 115). At that time the canal in the area where the James Wilkinson was operating was 200 to 300 feet wide (Abs. 29, 37, 107). Soundings taken in August of 1951 showed that there was a minimum 10-foot channel from the south end of the locks down the south part of the canal to the river, and by November 5, 1951, the water was deeper than it was in August, 1951 (Abs. 50, 51). Prior to November 5, 1951, small tugs had gone in and out of the south mouth of the canal. In August of 1951 bulkheads were hauled up to Lock 27 through the south part of the canal on a barge. A derrick barge about 200 feet long, 35 feet wide and with a full draft of 5 or 6 feet was also towed up to the lock (Abs. 50, 51, 57). Prior to 1951 a concrete plant, silos and other equipment were shipped in and out of the south part of the canal. A loading dock was built in 1947 about 400 yards below the locks and about 6 barge loads of sheet piling and whorley cranes were shipped in and out of the canal over this dock (Abs. 61).

The James Wilkinson operated with a crew of four: the engineer, the operator or lever man, the oiler and the laborer or deckhand (Abs. 81).

The operator handled the controls, the engineer ran the machinery, the oiler oiled the machinery and kept it up. All the remaining work on the dredge was done by the laborer or "deckhand" (Abs. 81).

The petitioner on November 5, 1951, had been working on the dredge for over a year as the laborer or deckhand. Since the job was on a 24-hour basis, there were three crews that operated the dredge, each crew taking an 8-hour shift. The men ate and lived at their respective homes ashore. Petitioner lived at Mount Olive, Illinois, some 40 miles from the job, and drove back and forth every day.

(Abs. 88). His duties were to bring supplies from shore and store them on the dredge, clean up the deck and other parts of the dredge, splice ropes, take soundings for the dredge operator and generally to keep the dredge in shape (Abs. 30, 31, 38, 47, 48, 88, 95). Petitioner and the other members of the crew, in accordance with Government regulations and orders from the company, wore life jackets when they were on the outside decks or going back and forth to shore in the small boat or dredge tender (Abs. 81, 88).

The operator, engineer and oiler all belonged to the Operating Engineers Union, while the deckhand belonged to the Laborers union. Men from Operating Engineers always handled small boats. They were all paid at an hourly rate with time and one-half for overtime on a 40-hour week basis (Abs. 37).

Respondent maintained a wooden shed on the bank of the canal, where the men kept their clothes and warmed themselves at a coal stove (Abs. 82). On the date in question petitioner came ashore to bring three lanterns from the dredge for the use of the shore party in signaling to the dredge. He gave one of these lanterns to one of the shore party and took the other two to the shanty. While there, he was injured as a result of an explosion or flash in the stove. It was not clear whether the explosion itself caused him to be thrown out of the shed or whether he was knocked out by respondent's superintendent who was there at the time and rushed out as the stove exploded (Abs. 88, 89).

Senko was paid some compensation under the provisions of the Workmen's Compensation Act of Illinois and was given medical attention by respondent.

In August of 1952, prior to the time he was represented by counsel, he filed an application of Adjustment of Claim under the Illinois Compensation Act. On February 4,

1953, at which time he had retained counsel, petitioner appeared at a hearing before an arbitrator and stipulated with respondent that on the 5th of November, 1951, they were operating under the provisions of the Workmen's Compensation Act of Illinois (Abs. 103, 104). Subsequently an award was entered by the Commission granting him compensation. Pending the filing of this suit under the Jones Act, an appeal was taken by petitioner, which appeal is still pending. No final decision has ever been rendered under the Workmen's Compensation Act. On the 20th of March, 1953, petitioner commenced this action in the City Court of Granite City, Illinois, under the provisions of the Merchant Marine Act as amended (46 U. S. C. A. 688), alleging in his complaint that he was a seaman and "member of the crew" of the dredge James Wilkinson (Abs. 147).

At the trial of this cause before a jury numerous witnesses testified on behalf of plaintiff, outlining generally the condition of the canal and locks on the date of the accident and prior thereto, the duties of plaintiff in his work on the dredge, and the nature and extent of his injuries. The stipulation was introduced into evidence and argued before the jury. The jury returned a verdict in favor of plaintiff in the sum of \$30,000.00 under the Jones Act, which through remittitur by the trial court was subsequently reduced to \$20,000.00 (Abs. 143, 144).

Defendant prosecuted an appeal to the Fourth District Appellate Court of the State of Illinois, which on the 3rd day of October, 1955, reversed the finding of the jury and the judgment of the trial court in its entirety and rendered judgment for defendant (Abs. 157).

Plaintiff thereafter filed a Petition for Leave to Appeal with the Supreme Court of the State of Illinois, which Petition was denied without opinion on the 13th day of January, 1956 (S. C. R. 169).

ARGUMENT.

I. Can a State Court Disregard the Jury's Findings of Fact That a Man Is a Seaman and Substitute Its Own Findings of Fact When There Is Evidence Supporting the Jury's Findings?

In **Tennant v. Peoria & Pekin Union Railway Co.**, 321 U. S. 29, at page 35, this court said:

"It is not the function of a court to search the record for conflicting circumstantial evidence in order to take the case away from the jury on a theory that the proof gives equal support to inconsistent and uncertain inferences. The focal point of judicial review is the reasonableness of the particular inference or conclusion drawn by the jury. It is the jury, not the court, which is the fact-finding body."

The plain language of that decision and of **South Chicago Coal & Dock Co. v. Bassett**, 1940, 309 U. S. 251, 60 S. C. 544, 84 L. Ed. 232, and **Lavender v. Kurn, Trustee of San Francisco Ry. Co.**, 327 U. S. 645, at 653, finds little if any support in the Fourth District Appellate Court of the State of Illinois. Its view on the weight to be accorded a jury verdict is best illustrated in its own words:

"Further, that the provision of law making the compensation act, the exclusive remedy of employees on vessels other than the master and members of the crew, is binding on the court and, **cannot be evaded by asserting that a jury's notion** of what law should be applied nullifies that provision, where there is no substantial dispute as to the relevant facts."

Not only did the court ignore the petitioner's right to a trial by jury as granted by 46 U. S. C. A., Sec. 688, it also reached a conclusion on the facts in conflict with decisions of the First Circuit Court of Appeals (**Gahagan Construc-**

tion Co. v. Armao, 165 F. 2nd 301, 1948), Fourth Circuit Court of Appeals (Summerlin v. Massman Const. Co., 199 F. 2nd 715, 1952), and Fifth Circuit Court of Appeals (McKie v. Diamond Marine Co., 204 F. 2nd 132).

In the "Gahagan" case the First Circuit held a dredge worker who performed substantially the same duties aboard his dredge as did the petitioner on the James Wilkinson to be a seaman and "member of the crew." Like petitioner, he worked an eight-hour shift, signed no articles and lived and boarded ashore.

In the "Summerlin" case the Fifth Circuit Court of Appeals held a fireman on a derriek barge to be a seaman and "member of the crew" irrespective of the fact that he lived ashore.

The Fifth Circuit in the "McKie" case followed the prior decisions on this subject and held that a submissible case for the jury was presented by evidence that plaintiff was a dredgeworker engaged in the usual work of persons attached to that type of vessel despite evidence that he lived ashore, was not an articleed seaman, and worked a regular eight-hour shift.

The Federal Court's opinions disclose a general unanimity of decision in allowing the jury's verdict to stand in cases under the Jones Act and the Federal Employers' Liability Act except "when there is a complete absence of probative facts to support the conclusion reached." **Lavender v. Kurn**, 327 U. S. 645, at 653; **South Chicago Coal & Dock Co. v. Bassett**, 1940, 309 U. S. 251, 60 S. C. 544, 84 L. Ed. 232, and **Gianfala v. The Texas Co.**, 350 U. S. 879. However, there still exists a definite conflict on this point between the state courts in Illinois and this court, as evidenced by the decision in **Harsh v. Illinois Term.**, 351 Ill. App. 272, rev. 348 U. S. 940, and the case here presented to the court.

An examination of the evidence presented by petitioner, keeping in mind the test adopted in **Lavender v. Kurn**, 327 U. S. 645, at page 652, and **Tennant v. Peoria & Pekin Union Ry. Co.**, 321 U. S. 29, at page 35, shows that petitioner cleaned up the dredge, took care of supplies (Abs. 88), took soundings. (Abs. 88, 246), that he only went ashore when he was doing something for the boat, that he watched for the signals from the shore party and relayed them to the engineer (Abs. 92, 93). The operator of the dredge, who had been working on the river for some twenty-five years, stated that petitioner's duties were to keep the dredge clean, take lanterns to the shore (Abs. 30, 31), splice ropes and keep everything in shape (Abs. 31), and that among dredge workers the person doing that job is called a "deckhand" (Abs. 32, 33). Undoubtedly, here is "an evidentiary basis for the jury's verdict." Although her travels were confined to the movement incidental to dredging in the canal during the year that petitioner was aboard, he did accompany her on whatever travels she did make.

Granted, the fact that petitioner slept at home and boarded ashore lend support to respondent's contention that he was not a seaman, but as was said in **Gahagan Const. Co. v. Armao**, 165 Fed. 2nd 301, at 305 (First Circuit, 1948):

"If different conclusions may be drawn from the facts, the determination of the finder of facts must stand. **South Chicago Coal & Dock Co. v. Bassett**, 1940, 309 U. S. 251, 60 S. Ct. 544, 84 L. ed. 732. Each case presents a different situation. No single factor is controlling, but the whole context must be considered."

II. When a Different Conclusion Can Be Drawn From Undisputed Facts, Can a State Court Substitute Its Conclusions for the Verdict of the Jury?

The Appellate Court bases its right to review the facts on a finding that there was no substantial dispute as to the relevant facts. This case was contested for four days in the trial court; a total of ten witnesses testified concerning petitioner's duties, the nature of the project on which he was working and his status. There were serious conflicts in the testimony concerning these factors. For example, respondent's witness Lakin testified that petitioner worked for him in the shore party at various times (Abs. 106), while several of petitioner's witnesses stated that he worked exclusively with the dredge crew.

Witness Thompson, Vice-President of the Respondent Corporation, testified that the men on the dredge did not take soundings (Abs. 83), while petitioner testified that soundings were taken by him from the dredge (Abs. 88, 95). Actually, and more important, there is an inherent conflict in the testimony of each of petitioner's own witnesses, as is true of every contested case, in that some of the facts testified to by each witness would lead the jury to one conclusion, i. e., that Senko was a seaman, while other facts testified to by the same witness would lead them to the opposite conclusion, i. e., that he was not a seaman. Is this conflict to be resolved by the Appellate Court or the jury? As was said by this court in **Tennant v. Peoria & Pekin Union Railway Co.**, 321 U. S. 29, at page 35:

"The very essence of its function is to select from among conflicting inferences and conclusions that which it considers most reasonable (cases cited). That conclusion, whether it relates to negligence, causation or any other factual matter, cannot be ignored. Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn

different inferences or conclusions or because judges feel that other results are more reasonable.”

Assuming that there was no dispute or conflict as to the material evidence, the Appellate Court decision is still not in accord with the rule as laid down by this court in **Gianfala v. The Texas Co., 350 U. S. 879**. In that case involving a fireman on an oil drilling barge only one witness was called on behalf of the plaintiff to show her deceased husband's status as a seaman. This witness was examined and cross-examined by both parties and a stipulation was adopted that the remaining six-man oil drilling crew would testify to substantially the same facts. There were no witnesses called by the defendant and solely on the testimony of one witness the jury held that the deceased was under the “Jones Act” and rendered a verdict in favor of the widow. The Fifth Circuit Court of Appeals (222 Fed. 2nd 382), as did the Fourth District Illinois Appellate Court, held that since the facts were not in dispute the status of decedent was a question of law to be determined by the judge. Petition for Certiorari was granted and the judgment of the Court of Appeals was reversed with directions to the District Court to reinstate its judgment. In its per curiam decision this court cited its own decision of **South Chicago Coal & Dock Co. v. Bassett, 309 U. S. 251, 60 S. Ct. 544, 84 L. ed. 732**, and **Gahagan Construction Co. v. Armao, 165 F. 2nd 301**, wherein the court said at page 305:

“Even if the facts are undisputed, the question of whether a party is a member of the crew is not necessarily one of law. If different conclusions may be drawn from the facts, the determination of the finder of facts must stand.”

It is apparent then that little, if any, distinction should be drawn between a case where the facts are disputed and one where they are undisputed. In both situations the

jury is entitled to weigh the evidence and reach their own conclusion. The resulting verdict must stand if it is supported by any probative evidence.

III. Can Any of the Operating Personnel of a Dredge Operating on the Inland Waterways of the United States Be a "Member of the Crew" of a Vessel Within the Meaning of the Merchant Marine Act of 1920 (Jones Act)?

The reasoning of the Appellate Court makes it clear that the verdict of the jury was reversed because the court did not believe that the vessel was engaged in maritime work or in navigation. For example, the court said: "The dredge had arms or poles called 'spuds' which pushed into the bottom and held the position and there were also cables to the shore for additional anchorage," and added, "Other than these contacts with the ground, the barge had no means of locomotion." It also referred to petitioner as a person who is not aboard "except when the vessel was anchored."

In distinguishing this case from the case of **McKie v. Diamond Marine Co.**, 204 Fed. 2nd 132; **Wilkes v. Mississippi River Sand and Gravel Co.**, 202 Fed. 2nd 383, and other cases involving dredgeworkers relied on by petitioner, the court said:

"Whether these cases should be regarded as close or as encroaching on enacted legislation is immaterial, they do not apply to a plaintiff employed under a union permit to perform common labor on a local project, and whose duties are performed while the outfit is securely attached to the ground."

The net result of this reasoning denies the benefits of the "Jones Act" to all men engaged in the usual and ordinary dredging operation on our navigable rivers and waterways.

The "James Wilkinson" was no different from the ordinary dredge; the operation it was performing on the 5th of November, 1951, was no different from the typical dredging work done daily on the various rivers throughout the country. This decision results in a conflict that must ultimately be resolved. Are dredge workers under the "Jones Act," as has been held by the various Circuit Courts of Appeal, or under the State Workmen's Compensation Act as indicated by the Fourth District Appellate Court of the State of Illinois?

The court reasons that petitioner could not be a seaman because he was only aboard the vessel when it was "anchored." A dredge can only perform its primary function when, to adopt the terminology of the court, it is "anchored." When the dredge is not "anchored" it is not, so to speak, working. The true test is whether or not the vessel is in navigation, and a dredge when it is "anchored" and dredging is just as much in navigation as a cargo ship crossing the Atlantic. It follows that the operating personnel of the dredge, i. e.; the operator, engineer, oiler and deckhand, are all aiding in the navigation of the vessel.

Both respondent and the Appellate Court assumed that the James Wilkinson was a "vessel". Since this is true then when the vessel is performing the work for which she is designed, whether "anchored" or sunk to the bottom of the ocean as in **Gianfala v. Texas Co.**, she is in navigation. If these two premises are accepted, then the position of the Appellate Court becomes untenable, for how can a vessel be in navigation without a crew? If she has a crew, who are the members of the crew? They are those on board to aid the vessel in the performance of the work for which she was designed; those who conduct the dredging operation, including the petitioner who did everything aboard but operate and maintain the machinery. As was said in **Norton v. Warner Co.**, 321 U. S. 565 at 572, 64 S. Ct. 747:

"His (functions) were indeed different from the functions of any other 'crew' only as they were made so by the nature of the vessel and its navigational requirements."

CONCLUSION.

In conclusion, we believe that because of its denial of petitioner's right to have his status determined by a jury, because of the conflict between this court's decision in *Gianfala v. Texas Co.* and *South Chicago Coal and Dock Co. v. Bassett*, supra, and the decision of the Appellate Court, and because of the far-reaching effects on litigants under the "Jones Act", this decision should be reviewed by this court.

Respectfully submitted,

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APPENDIX.

**OPINION OF FOURTH DISTRICT APPELLATE
COURT.**

Filed Oct. 3, 1955.

Scheineman, J.

Jacob Senko brought this suit against his employer, LaCrosse Dredging Corporation, claiming that he had suffered personal injuries through the negligence of said employer. After a jury verdict of \$30,000 for plaintiff, the trial court required a remittitur and entered judgment for \$20,000. The defendant's motion for judgment and for new trial were both denied.

The suit was filed under the provisions of Section 33 of the Merchant Marine Act of 1920, commonly known as the Jones Act, 46 U. S. C. A., Sec. 688. In substance, the Jones Act provides that seamen on vessels operating in navigable waters, who are injured in the course of their employment, shall have the same rights and remedies at law which appertain to railway employees under other federal statutes. Questions presented on this appeal require a full statement of facts, and a review of the legislative and judicial background of the statute, since it is an unusual type of case in a state court.

Defendant operated a dredge on which plaintiff was employed. At the request of a labor union, defendant had erected a shed on land near its dredging operations, equipped with benches and a stove, so that, during off-duty intervals, the workmen would have a place to warm themselves and obtain shelter. The incident in question occurred in or near this shed on November 5, 1951.

About 10:45 P. M. plaintiff came from the dredge to the shed, where he heard another employee (the assistant

superintendent) say that he would put some coal on the fire. This was done by removing a stove lid, picking up a coal bucket, and emptying the contents in the stove. Apparently plaintiff did not actually see the operation, but the fire flared up with a great flash and both men ran out, colliding at the doorway and falling. Or perhaps plaintiff was just approaching the door from outside and was met by the running man. Plaintiff was somewhat vague as to the details, but anyway, he fell. He claims severe injuries resulted to him.

It is plaintiff's theory that he is a seaman under the Jones Act, that there must have been something other than coal in the bucket to cause the flash, that he has not attempted to prove specific acts of negligence, but defendant should be held liable under the doctrine of *res ipsa loquitur*.

Defendant contends it is entitled to a directed verdict, because: 1, plaintiff was not a member of a crew of seamen and is not under the Jones Act; 2, the dredge was not operating in navigable waters, and 3, there was no evidence of negligence on its part and no basis to apply the doctrine of *res ipsa loquitur*.

From examination of the abstract and briefs, we find no dispute as to the facts material to the first defense. It appears that, prior to plaintiff's said employment, the dredging equipment had been brought to the site by a tug, during which movement, the crew of the tug managed the dredge and provided it with navigation lights. The dredge was anchored about 15 feet from shore in Gabaret Chute, which is a slough connected with the Mississippi, the purpose being to dredge out a by-pass around a rocky section of the river, through the slough to a canal connected to the river at another point.

The dredge consisted of a scow or barge upon which was mounted dredging machinery, pumps, dynamo, etc. It

operated day and night, so that it had a lighting system, including the white mooring lights required on stationary objects. A pipe ran from the barge to the shore, through which excavated material was pumped and disposed of. The pipe rested on pontoons, and this formed a walk, with handrail, by which the men could come and go. There was also a rowboat, but the distance from shore was too short to row, so in using the boat, it was simply given a push to move it the few feet.

The dredge had arms or poles called "spuds" which pushed into the bottom and held the position, and there were also cables to the shore for additional anchorage. The barge could be moved slowly by operating the spuds in a walking fashion, also by winding the cables on a winch. Other than these contacts with the ground the barge had no means of locomotion.

Dredging operations were conducted by four men aboard, an operator, an engineer, an oiler, and plaintiff. Defendant did not furnish meals or sleeping quarters, all the men lived ashore, worked eight-hour shifts, were paid by the hour, and plaintiff drove back and forth daily from his home some 40 miles distant. Of the four men, the first three were members of a building crafts union, and plaintiff was a member of the Common Laborer's Union at Mt. Olive. He secured this employment through the union hall at Granite City, and all four men had union permits to work at this particular site.

According to a witness permitted to testify as to the usual duties of a laborer or deckhand on a dredge, the duties were to clean the deck, also the navigation lights, and to take soundings when the barge was in motion. However, these items were not pertinent to the plaintiff, for there were no navigation lights on the dredge, and he had taken soundings only for the purpose of noting the depth of the cut. He had nothing to do with moving the barge

and testified he had never been aboard when it was moved. He gave as his main duties the delivery of supplies and proper storage thereof, bringing them when needed, and sometimes taking things ashore where other men were working at earth moving.

From the foregoing, it is apparent that, by any ordinary test, the plaintiff would not classify as a seaman. However, the courts have enlarged the meaning of the term. It was often said that a seaman aiding in navigation was not limited to those who can "hand, reef and steer." Thus it was easy to include all those who customarily traveled with a vessel in its movements, such as a cook, a clerk, a stewardess, etc. But the broadening of the definition continued, until it came to include practically any workman whose duties required him to set foot on a ship at any time or place. Thus, longshoremen were designated as seamen, although they worked only at loading or unloading a vessel tied at the docks.

A longshoreman injured in the course of his duties on land would normally come under the state's workmen's compensation act, but if the injury occurred on the vessel while it was in navigable waters, the state law could not apply, for the federal law had jurisdiction. These men were given some remedy by calling them seamen under the Jones Act.

Men who ply the seas, with its hazards, rigors and isolation, have long been regarded as wards of the court in admiralty, and this solicitude has been applied in courts of law. Men who board the ship only in the safety of a harbor, who work only an eight hour shift thereon, who return to their families daily, and sleep in the comfort and security of their own beds every night are not in exactly the same position. Congress proceeded to enact new legislation, which was, in substance, a compensation act.

Possibly the men involved had something to do with the new legislation, since they were in position to observe the operation of both types of laws. The new law enacted by congress, known as the Longshoremen's and Harbor Workers Compensation Act, 33 U. S. C. A., Sec. 902 (1927), is patterned after prior compensation acts, provides recovery for personal injury in line of duty regardless of absence of negligence and makes the remedy limited and exclusive.

The legislative history of this act is reviewed in *South Chicago Coal and Dock Co. v. Bassett*, 309 U. S. 251, 60 S. Ct. 544, 84 L. Ed. 732. It appears that ships' masters and crews preferred to remain under the Jones Act; accordingly, a provision was inserted in the new act excluding "seamen". Obviously, under the prevailing definition of that word, practically everybody that congress intended to include, would have been excluded. As finally passed, the words "master or member of a crew" were substituted for "seamen." The Supreme Court held the purpose was:

"to provide compensation for a class of employees at work on a vessel in navigable waters who, although they might be classed as seamen, were still regarded as distinct from members of a 'crew.' They were persons serving on vessels, to be sure, but their service was that of laborers, of the sort performed by longshoremen and harbor workers and thus distinguished from those employees on the vessel who are naturally and primarily on-board to aid in her navigation."

In the above case the man involved had the primary duty of loading coal on vessels in harbor, but he was aboard the fueling vessel when it was in motion, he was called a "deckhand" and occasionally had incidental duties in connection therewith, such as throwing a ship's rope or making the boat fast. The court attached no significance

to his title and held these were duties which could readily be performed or aided by a harbor worker, and that he came under the compensation act, rather than the Jones Act, observing:

“that the primary duty of the decedent was to facilitate the flow of coal to the vessel being fueled, that he had no duties while the boat was in motion, that he slept at home and boarded off ship and was called each day as he was needed. Workers of that sort on harbor craft may appropriately be regarded as ‘in the position of longshoremen or other casual workers on the water.’ ”

The legislative history of these acts and the interpretation thereof was repeated in *Swanson v. Marra Bros.* (1946), 328 U. S. 1, 66 S. Ct. 869, 90 L. Ed. 1045. The man involved was engaged in loading cargo onto a vessel in Philadelphia harbor, and he was struck by a liferaft falling therefrom while he was on the pier. The suit was brought under the Jones Act and was dismissed by the trial court. The decision was affirmed on intermediate and final appeals. The Supreme Court recognized that the suit would have been proper under the Jones Act according to its own decisions prior to the passage of the Longshoremen's Act of 1927, making particular reference to *International Stevedoring Co. v. Haverty*, 272 U. S. 50, 47 S. Ct. 19, 71 L. Ed. 157, decided only six months before passage of the new statute. The court ruled:

“We must take it that the effect of these provisions of the Longshoremen's Act is to confine the benefits of the Jones Act to members of the crew plying in navigable waters and to substitute for the right of recovery, recognized by the *Haverty* case, only such rights to compensation as are given by the Longshoremen's Act.”

Other cases on the subject are similar in effect, see particularly, *Walling v. Bay State Dredging Co.*, 149 F. 2d

346, 161 ALR 825, Cert. Den. 326 U. S. 760, 66 S. Ct. 140, 90 L. Ed. 140."

This court therefore holds as a general proposition: an employee whose principal duty is to load supplies on a vessel at anchor, and to perform incidental tasks of a common labor character, and who is not naturally and primarily on board to aid in navigation, cannot maintain an action under the Jones Act.

Further, as to this particular case: it being undisputed that plaintiff lived and boarded ashore, worked the hours of laborers only, was paid by the hour, had the primary duty of loading material and supplies on board, or unloading them, and of performing various other incidental common labor tasks, and who was not employed for nor used in the movement of the vessel from place to place, and was not aboard except when the vessel was anchored, he cannot maintain an action under the Jones Act.

III.

Further, that the provision of law making the compensation act the exclusive remedy of employees on vessels other than the master and members of the crew, is binding on the court and cannot be evaded by asserting that a jury's notion of what law should be applied nullifies that provision, where there is no substantial dispute as to the relevant facts.

Cases which plaintiff contends are contrary to the foregoing holding have been considered by this court, particularly the Circuit Court cases upholding verdicts under the Jones Act, namely, Gahagan Const. Corp. v. Armao, 165 Fed. 2nd 301; Kibadeaux v. Standard Dredging Co., 81 Fed. 2nd 670; McKie v. Diamond Marine Co., 204 Fed. 2nd 132; Maryland Cas. Co. v. Lawson, 94 Fed. 2nd 190; Wilkes v. Mississippi River Sand and Gravel Co., 202 Fed. 2nd 383.

These cases cannot be regarded as in point, for the reason that they all involve employees who customarily accompanied the vessel on its voyages, whether extended or daily. This court does not hold that members of the crew or those aiding in navigation consist only of those who "hand, reef and steer." It is to be doubted employees who sign on for a voyage are excluded from the Jones Act, whether they be cooks or sometimes laborers.

Possibly phrases can be plucked from these opinions as indicating a tendency to broaden the definition of "crew" or of "aiding in navigation", but there will necessarily be close cases of employees traveling with the vessel. In the Gahagan case the plaintiff ate and slept on board on a trip from New York to Boston, worked out in the sea harbor when the tide permitted, and had some regular duties of a maritime nature.

In the Kibadeaux case the vessel went from port to port around the entire coast, and plaintiff was paid on a semi-monthly basis, like other members of the crew. The McKie case, by a divided court, involved a dredge which traveled about in Tabb's Bay off the Texas coast, and plaintiff worked at whatever travel there was by the vessel. In the Maryland Casualty Co. case the plaintiff was actually a common laborer, but he necessarily went to sea with the outfit, ate and slept aboard, making more or less regular runs with the crew. In the Wilkes case the court noted that the plaintiff had a permanent connection with the vessel such as to expose him to the same hazards of marine service as those shared by all aboard.

Whether these cases should be regarded as close or as encroaching on enacted legislation is immaterial, they do not apply to a plaintiff employed under a union permit to perform common labor on a local project, and whose duties are performed while the outfit is securely attached to the ground.

Since the plaintiff is not under the Jones Act, it is unnecessary for this court to pass upon other points raised.

In conclusion it may be observed that plaintiff is not without remedy. The injuries occurred on land so that the case is not confined to federal jurisdiction. The record discloses that plaintiff actually filed a claim with the Illinois Industrial Commission, and at a proceeding, before its designated hearing officer plaintiff and defendant stipulated they were under the Illinois Compensation Act and that defendant had made payments thereunder including medical and hospital expenses, and 14 weeks temporary and total disability compensation. We did not deem it necessary to make this any part of the decision herein.

For the reasons given, the judgment is reversed.

Judgment Reversed.

Bardens, P. J., and Culbertson, J. concur.

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JOHN T. FEY, Clerk

IN THE
SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1956.

No. 62.

JACOB SENKO,
Petitioner,

vs.

LaCROSSE DREDGING CORPORATION,
Respondent.

On Writ of Certiorari to the Appellate Court of the
State of Illinois, Fourth District.

BRIEF FOR PETITIONER.

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OPINION BELOW.

The opinion of the Fourth District Appellate Court of Illinois is reported in 7 Ill. App. 2nd 307, 129 N. E. 2nd 454. The Supreme Court of Illinois denied leave to appeal without written opinion on the thirteenth of January, 1956 (R. 199).

JURISDICTION.

The judgment sought to be reviewed was entered on the third day of October, 1955, and became final on the 13th day of January, 1956, on the denial of leave to appeal by the Supreme Court of the State of Illinois (R. 199). The Petition for Writ of Certiorari was filed on April 12, 1956, and was granted on May 28, 1956. This action was brought pursuant to the provisions of Title 46, U. S. C. A., Section 688, the same being a portion of what is commonly known as the "Jones Act." Plaintiff's amended complaint alleged specifically that the plaintiff was a seaman and member of a crew of a vessel within the provisions of this act (R. 1).

The jurisdiction of this Honorable Court is invoked under the Act of June 25, 1948, c. 646, 62 Stat. 929, 28 U. S. C. A. 1257. (3).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.

"The judicial power shall extend to all cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority—to all cases affecting Ambassadors, other public Ministers and Consuls—to all cases of Admiralty and maritime Jurisdiction—to Controversies to which the United States shall be a Party—to Controversies between Citizens of the same State claiming Lands under Grants of different States and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects." Section 2 of Article 3 of the Constitution of the United States.

Recovery for Injury to or Death of Seaman.

"Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an

action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located." Mar. 4, 1915, c. 153, Sec. 20, 38 Stat. 1185; June 5, 1920, c. 250, Sec. 33, 41 Stat. 1007; 46 U. S. C. A., Sec. 688.

**Extension of Admiralty and Maritime Jurisdiction;
Libel in rem or in Personam;
Exclusive Remedy; Waiting Period.**

"The admiralty and maritime jurisdiction of the United States shall extend to and include all cases of damage or injury, to person or property, caused by a vessel on navigable water, notwithstanding that such damage or injury be done or consummated on land.

"In any such case suit may be brought in rem or in personam according to the principles of law and the rules of practice obtaining in cases where the injury or damage has been done and consummated on navigable water; Provided, that as to any suit against the United States for damage or injury done or consummated on land by a vessel on navigable waters, the Public Vessels Act or Suits in Admiralty Act, as appropriate, shall constitute the exclusive remedy for all causes of action arising after June 19, 1948, and for all causes of action where suit has not been hitherto filed under the Federal Tort Claims Act: Provided further, that no suit shall be filed against the

United States until there shall have expired a period of six months after the claim has been presented in writing to the Federal Agency owning or operating the vessel causing the injury or damage." June 19, 1948, c. 526, 62 Stat. 496; 46 U. S. C. A., Sec. 740.

QUESTIONS PRESENTED FOR REVIEW.

1. Can a State Court disregard the jury's findings of fact that a man is a seaman and substitute its own findings of fact when there is evidence supporting the jury's findings?

2. When a different conclusion can be drawn from undisputed facts, can a State Court substitute its conclusions for the verdict of the jury?

3. Can any of the operating personnel of a dredge operating on the inland waterways of the United States be a "member of the crew" of a vessel within the meaning of the Merchant Marine Act of 1920 (Jones Act)?

STATEMENT OF THE CASE.

In 1946 the U. S. Army Corps of Engineers, through various contractors and subcontractors, including the respondent, LaCrosse Dredging Corporation, commenced construction on the Chain of Rocks Canal Project (R. 39). The canal, which bypasses a treacherous rocky section of the main river channel, was part of a long range over-all plan to make the river more navigable as a whole (R. 39, 63).

The canal, as designed, ran generally north and south from a point in the river north of Hartford, Illinois, to a point in the river near Venice, Illinois. Included as a part of the canal was a lock known as Lock No. 27, which was located at a place about one mile north of the southerly end of the canal (R. 38). South of Lock 27 and for a por-

tion of its length north thereof, the canal followed old Gabaret Chute, a slough which had run more or less parallel to and connecting at both ends with the Mississippi River (R. 38, 77, 78). In past years this chute had been used for swimming and boating. It had also been used commercially by boats and barges hauling mules, coal wagons and other livestock from the mainland to Gabaret Island. A ferry had been operated across the chute from the mainland to Gabaret Island, but this ferry had been discontinued prior to the time construction began on the canal (R. 14, 79, 84, 94, 95).

In 1947, when respondent began its dredging operation on the south part of the canal, it came up Gabaret Chute from the river widening and deeping the canal as it moved north (R. 27, 40, 147). Among the dredges owned and operated by respondent was the "James Wilkinson." Built by the St. Louis Shipyards, it was 136 feet long and 36 feet wide with a draft of 5½ feet. Like all dredges, its principal equipment consisted of a large pump driven by a Diesel motor. It also had auxiliary motors used to operate its generating plant, winches and the "spuds" at the rear of the dredge (R. 325, 158).

Some time late in 1950 or early 1951 the James Wilkinson was brought up the south part of the canal by dredge tenders, and on November 5, 1951, was operating near the south end of Lock 27 (R. 148). At that time the canal in the area where the James Wilkinson was operating was 200 to 300 feet wide (R. 15, 29, 131). Soundings taken in August of 1951 showed that there was a minimum 10-foot channel from the south end of the locks down the south part of the canal to the river, and by November 5, 1951, the water was deeper than it was in August, 1951 (R. 57, 58). Prior to November 5, 1951, small tugs had gone in and out of the south mouth of the canal. In August of 1951 bulkheads were hauled up to Lock 27 through the south part

of the canal on a barge. A derrick barge about 200 feet long, 35 feet wide, and with a full draft of 5 or 6 feet, was also towed up to the lock (R. 57, 58, 69). Prior to 1951 a concrete plant, silos and other equipment were shipped in and out of the south part of the canal. A loading dock was built in 1947 about 400 yards below the locks and about six barge loads of sheet piling and whorley cranes were shipped in and out of the canal over this dock (R. 79, 80).

The James Wilkinson operated with a crew of four—the engineer, the operator or lever man, the oiler and the laborer or deckhand (R. 89).

The operator handled the controls, the engineer ran the machinery, the oiler oiled the machinery and kept it up. All the remaining work on the dredge was done by the laborer or "deckhand" (R. 90).

The petitioner, on November 5, 1951, had been working on the dredge for over a year as the laborer or deckhand. Since the job was on a 24-hour basis, there were three crews that operated the dredge, each crew taking an 8-hour shift. The men ate and lived at their respective homes ashore. Petitioner lived at Mount Olive, Illinois, some 40 miles from the job, and drove back and forth every day (R. 103). His duties were to bring supplies from shore and store them on the dredge, clean up the deck and other parts of the dredge, splice ropes, take soundings for the dredge operator and generally to keep the dredge in shape (R. 16, 17, 18, 31, 32, 55, 103, 104, 114). Petitioner and the other members of the crew, in accordance with Government regulations and orders from the company, wore life jackets when they were on the outside decks or going back and forth to shore in the small boat or dredge tender (R. 90, 104).

The operator, engineer and oiler all belonged to the Operating Engineers Union, while the deckhand belonged

to the Laborers union. Men from Operating Engineers always handled small boats. They were all paid at an hourly rate with time and one-half for overtime on a 40-hour week basis. (R. 29, 30).

Respondent maintained a wooden shed on the bank of the canal, where the men kept their clothes and warmed themselves at a coal stove (R. 91). On the date in question petitioner came ashore to bring three lanterns from the dredge for the use of the shore party in signaling to the dredge. He gave one of these lanterns to one of the shore party and took the other two to the shanty. While there, he was injured as a result of an explosion or flash in the stove. It was not clear whether the explosion itself caused him to be thrown out of the shed or whether he was knocked out by respondent's superintendent who was there at the time and rushed out as the stove exploded (R. 105, 106, 107).

Senko was paid some compensation under the provisions of the Workmen's Compensation Act of Illinois and was given medical attention by respondent.

In August of 1952, prior to the time he was represented by counsel, he filed an application of Adjustment of Claim under the Illinois Compensation Act. On February 4, 1953, at which time he had retained counsel, petitioner appeared at a hearing before an arbitrator and stipulated with respondent that on the 5th of November, 1951, they were operating under the provisions of the Workmen's Compensation Act of Illinois (R. 125). Subsequently an award was entered by the Commission granting him compensation. Pending the filing of this suit under the Jones Act, an appeal was taken by petitioner, which appeal is still pending. No final decision has ever been rendered under the Workmen's Compensation Act. On the 20th of March, 1953, petitioner commenced this action in the City Court of Granite City, Illinois, under the provisions of the

Merchant Marine Act as amended (46 U. S. C. A. 688), alleging in his complaint that he was a seaman and "member of the crew" of the dredge James Wilkinson (R. 1-5).

At the trial of this cause before a jury numerous witnesses testified on behalf of plaintiff, outlining generally the condition of the canal and locks on the date of the accident and prior thereto, the duties of plaintiff in his work on the dredge, and the nature and extent of his injuries. The stipulation was introduced into evidence and argued before the jury. The jury returned a verdict in favor of plaintiff in the sum of \$30,000.00 under the Jones Act, which through remittitur by the trial court was subsequently reduced to \$20,000.00 (R. 182, 183).

Defendant prosecuted an appeal to the Fourth District Appellate Court of the State of Illinois, which on the 3rd day of October, 1955, reversed the finding of the jury and the judgment of the trial court in its entirety and rendered judgment for defendant (R. 198, 199).

Plaintiff thereafter filed a petition for Leave to Appeal with the Supreme Court of the State of Illinois, which petition was denied without opinion on the 13th day of January, 1956 (R. 199).

SUMMARY OF ARGUMENT.

I.

The evidence discloses that Petitioner's duties included cleaning up of the dredge (R. 16, 18, 103); taking care of supplies (R. 31, 104); taking soundings (R. 104, 114); relaying signals from shore (R. 106, 108); splicing rope (R. 18); keeping everything in shape (R. 16, 17); taking lanterns ashore (R. 17); that his duties were confined to the dredge except when he was ashore on the ship's business (R. 17, 55, 108); that he had to wear a life jacket when he was on the outside deck or when he went ashore (R. 16, 104).

The above furnished an evidentiary basis for the finding of the jury under the tests laid down by our Supreme Court. This is true even though the uncontroverted testimony of plaintiff's witnesses might lead different people to a different conclusion. The selection of the most reasonable interpretation of facts is the function of the jury and since there was an evidentiary basis for its finding that plaintiff was a member of a crew, its determination is final even though the reviewing court might reach a different conclusion from the facts. *Tennant v. Peoria & Pekin Union Railway Co.*, 321 U. S. 29, at page 35; *Lavender v. Kurn*, 327 U. S. 645, at 653; *South Chicago Coal & Dock Co. v. Bassett*, 309 U. S. 251.

II.

There were conflicts in the testimony relating to the issue of whether or not petitioner was a seaman and member of the crew of a vessel. Some of the testimony of plaintiff's witnesses on this point was controverted by testimony offered by the defendant. Therefore, the verdict of the jury must stand because it resolved these conflicts of fact.

However, assuming that there was no conflict as to the material evidence, the question of whether or not petitioner was a seaman is still a question of fact for the jury because reasonable men may differ in the conclusion to be reached from given facts, even if disputed. *Gianfala v. The Texas Co.*, 350 U. S. 879.

III.

The Appellate Court stated that the Jones Act did not apply to one employed under a union permit to perform common labor on a local project where his duties were performed while the outfit was securely attached to the ground. They stated that it was a local project even though it was carried out by the United States Army Corps of Engineers for the purpose of making the Mississippi River more navigable as a whole (R. 39, 63). The net result of this reasoning is to deny the benefit of the "Jones Act" to all men engaged in the usual and ordinary dredging operation on our navigable rivers and waterways. Since the "James Wilkinson" was doing the same work as any other dredge, this decision conflicts with the rules laid down by all of our Federal Courts.

Both the respondent and the Appellate Court have assumed that the "James Wilkinson" was a vessel. When she is performing the work for which she is designed, she is in navigation even though to adopt the terminology of the Appellate Court she is "anchored." Since she is a vessel in navigation she must have a crew and the crew are those members who aid her in her dredging operation, including plaintiff who did everything aboard but operate and maintain the machinery.

ARGUMENT.

I. Can a State Court Disregard the Jury's Findings of Fact That a Man Is a Seaman and Substitute Its Own Findings of Fact When There Is Evidence Supporting the Jury's Findings?

In **Tennant v. Peoria & Pekin Union Railway Co.**, 321 U. S. 29, at page 35, this court said:

"It is not the function of a court to search the record for conflicting circumstantial evidence in order to take the case away from the jury on a theory that the proof gives equal support to inconsistent and uncertain inferences. The focal point of judicial review is the reasonableness of the particular inference or conclusion drawn by the jury. **It is the jury, not the court, which is the fact-finding body.**"

The plain language of that decision and of **South Chicago Coal & Dock Co. v. Bassett**, 1940, 309 U. S. 251, 60 S. C. 544, 84 L. Ed. 232, and **Lavender v. Kurn, Trustee of San Francisco Ry. Co.**, 327 U. S. 645, at 653, finds little if any support in the Fourth District Appellate Court of the State of Illinois. Its view on the weight to be accorded a jury verdict is best illustrated in its own words:

"Further, that the provision of law making the compensation act the exclusive remedy of employees on vessels other than the master and members of the crew, is binding on the court and **cannot be evaded by asserting that a jury's notion** of what law should be applied nullifies that provision, where there is no substantial dispute as to the relevant facts."

Not only did the court ignore the petitioner's right to a trial by jury as granted by 46 U. S. C. A., Sec. 688, it also reached a conclusion on the facts in conflict with decisions

of the First Circuit Court of Appeals (*Gahagan Construction Co. v. Armao*, 165 F. 2nd 301, 1948), Fourth Circuit Court of Appeals (*Summerlin v. Massman Const. Co.*, 199 F. 2nd 715, 1952), and Fifth Circuit Court of Appeals (*McKie v. Diamond Marine Co.*, 204 F. 2nd 132).

In the "Gahagan" case the First Circuit held a dredge worker who performed substantially the same duties aboard his dredge as did the petitioner on the *James Wilkinson* to be a seaman and "member of the crew." Like petitioner, he worked an eight-hour shift, signed no articles and lived and boarded ashore.

In the "Summerlin" case the Fifth Circuit Court of Appeals held a fireman on a derrick barge to be a seaman and "member of the crew" irrespective of the fact that he lived ashore.

The Fifth Circuit in the "McKie" case followed the prior decisions on this subject and held that a submissible case for the jury was presented by evidence that plaintiff was a dredge worker engaged in the usual work of persons attached to that type of vessel despite evidence that he lived ashore, was not an articulated seaman, and worked a regular eight-hour shift.

The Federal Court's opinions disclose a general unanimity of decision in allowing the jury's verdict to stand in cases under the Jones Act and the Federal Employers' Liability Act except "when there is a complete absence of probative facts to support the conclusion reached." *Lavender v. Kurn*, 327 U. S. 645, at 653; *South Chicago Coal & Dock Co. v. Bassett*, 1940, 309 U. S. 251, 60 S. C. 544, 84 L. Ed. 232, and *Gianfala v. The Texas Co.*, 350 U. S. 879. However, there still exists a definite conflict on this point between the state courts in Illinois and this court, as evidenced by the decision in *Harsh v. Illinois Term.*, 351 Ill. App. 272, rev. 348 U. S. 940, and the case here presented to the court.

An examination of the evidence presented by petitioner, keeping in mind the test adopted in **Lavender v. Kurn**, 327 U. S. 645, at page 652, and **Tennant v. Peoria & Pekin Union Ry. Co.**, 321 U. S. 29, at page 35, shows that petitioner cleaned up the dredge, took care of supplies (R. 103, 104), took soundings (R. 104, 114), that he only went ashore when he was doing something for the boat, that he watched for the signals from the shore party and relayed them to the engineer (R. 108). The operator of the dredge, who had been working on the river for some twenty-five years, stated that petitioner's duties were to keep the dredge clean, take lanterns to the shore (R. 18), splice ropes and keep everything in shape (R. 18), and that among dredge workers the person doing that job is called a "deckhand" (R. 20). Undoubtedly, here is "an evidentiary basis for the jury's verdict." Although her travels were confined to the movement incidental to dredging in the canal during the year that petitioner was aboard, he did accompany her on whatever travels she did make.

Granted, the fact that petitioner slept at home and boarded ashore lend support to respondent's contention that he was not a seaman, but as was said in **Gahagan Const. Co. v. Armao**, 165 Fed. 2nd 301, at 305 (First Circuit, 1948):

"If different conclusions may be drawn from the facts, the determination of the finder of facts must stand. **South Chicago Coal & Dock Co. v. Bassett**, 1940, 309 U. S. 251, 60 S. Ct. 544, 84 L. ed. 732. Each case presents a different situation. No single factor is controlling, but the whole context must be considered."

Then, too, at Respondent's request, the jury was instructed on the issues in this case. By his thirteenth instruction, he pointed out each and every element to be

taken into consideration by the jury in arriving at a conclusion as to whether or not Petitioner was a seaman within the meaning of the Jones Act (R. 173). Having told the jury that "the essential and decisive elements of the definition of a 'member of a crew' are that the vessel be in navigation; that there be a more or less permanent connection with the vessel and that the worker be aboard primarily to aid in navigation" is the Respondent now to be permitted to question the jury's right and ability to pass on this issue?

The jury, by Respondent's instruction number sixteen, were given a comprehensive summary of the definition of the term "navigable waters." By instruction number twenty they were told that they must find that Petitioner was a seaman as defined in the instructions before they could allow recovery and by instruction number twenty-one, that if the vessel was not operating on navigable waters, then Petitioner could not recover (R. 174, 175). All of the elements concerning whether or not petitioner was under the Jones Act were covered clearly and in understandable language by the instructions. Based on the evidence and these instructions, they found that he was a seaman and member of the crew of a vessel operating on navigable waters of the United States. This verdict is final.

II. When a Different Conclusion Can Be Drawn From Undisputed Facts, Can a State Court Substitute Its Conclusions for the Verdict of the Jury?

The Appellate Court bases its right to review the facts on a finding that there was no substantial dispute as to the relevant facts. This case was contested for four days in the trial court; a total of ten witnesses testified concerning petitioner's duties, the nature of the project on which he was working and his status. There were serious conflicts in the testimony concerning these factors. For example,

respondent's witness Lakin testified that petitioner worked for him in the shore party at various times (R. 127), while several of petitioner's witnesses stated that he worked exclusively with the dredge crew.

Witness Thompson, Vice-President of the Respondent Corporation, testified that the men on the dredge did not take soundings (R. 93), while petitioner testified that soundings were taken by him from the dredge (R. 104, 114). Actually, and more important, there is an inherent conflict in the testimony of each of petitioner's own witnesses, as is true of every contested case, in that some of the facts testified to by each witness would lead the jury to one conclusion, i. e., that Senko was a seaman, while other facts testified to by the same witness would lead them to the opposite conclusion, i. e., that he was not a seaman. Is this conflict to be resolved by the Appellate Court or the jury? As was said by this court in **Tennant v. Peoria & Pekin Union Railway Co.**, 321 U. S. 29, at page 35:

"The very essence of its function is to select from among conflicting inferences and conclusions that which it considers most reasonable (cases cited). That conclusion, whether it relates to negligence, causation or any other factual matter, cannot be ignored. Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable."

Assuming that there was no dispute or conflict as to the material evidence, the Appellate Court decision is still not in accord with the rule as laid down by this court in **Gianfala v. The Texas Co.**, 350 U. S. 879. In that case involving a fireman on an oil drilling barge only one witness was called on behalf of the plaintiff to show her

deceased husband's status as a seaman. This witness was examined and cross-examined by both parties and a stipulation was adopted that the remaining six-man oil drilling crew would testify to substantially the same facts. There were no witnesses called by the defendant and solely on the testimony of one witness the jury held that the deceased was under the "Jones Act" and rendered a verdict in favor of the widow. The Fifth Circuit Court of Appeals (222 Fed. 2nd 382), as did the Fourth District Illinois Appellate Court, held that since the facts were not in dispute the status of decedent was a question of law to be determined by the judge. Petition for Certiorari was granted and the judgment of the Court of Appeals was reversed with directions to the District Court to reinstate its judgment. In its per curiam decision this court cited its own decision of **South Chicago Coal & Dock Co. v. Bassett**, 309 U. S. 251, 60 S. Ct. 544, 84 L. ed. 732, and **Gahagan Construction Co. v. Armao**, 165 F. 2nd 301, wherein the court said at page 305:

"Even if the facts are undisputed, the question of whether a party is a member of the crew is not necessarily one of law. If different conclusions may be drawn from the facts, the determination of the finder of facts must stand."

It is apparent then that little, if any, distinction should be drawn between a case where the facts are disputed and one where they are undisputed. In both situations the jury is entitled to weigh the evidence and reach their own conclusion. The resulting verdict must stand if it is supported by any probative evidence.

III. Can Any of the Operating Personnel of a Dredge Operating on the Inland Waterways of the United States Be a "Member of the Crew" of a Vessel Within the Meaning of the Merchant Marine Act of 1920 (Jones Act)?

The reasoning of the Appellate Court makes it clear that the verdict of the jury was reversed because the court did not believe that the vessel was engaged in maritime work or in navigation. For example, the court said: "The dredge had arms or poles called 'spuds' which pushed into the bottom and held the position and there were also cables to the shore for additional anchorage," and added, "Other than these contacts with the ground, the barge had no means of locomotion." It also referred to petitioner as a person who is not aboard "except when the vessel was anchored."

In distinguishing this case from the case of **McKie v. Diamond Marine Co.**, 204 Fed. 2nd 132; **Wilkes v. Mississippi River Sand and Gravel Co.**, 202 Fed. 2nd 383, and other cases involving dredgeworkers relied on by petitioner, the court said:

"Whether these cases should be regarded as close or as encroaching on enacted legislation is immaterial, they do not apply to a plaintiff employed under a union permit to perform common labor on a local project, and whose duties are performed while the outfit is securely attached to the ground."

The net result of this reasoning denies the benefits of the "Jones Act" to all men engaged in the usual and ordinary dredging operation on our navigable rivers and waterways.

The "James Wilkinson" was no different from the ordinary dredge; the operation it was performing on the 5th of November, 1951, was no different from the typical dredging work done daily on the various rivers throughout the

country. This decision results in a conflict that must ultimately be resolved. Are dredge workers under the "Jones Act," as has been held by the various Circuit Courts of Appeal, or under the State Workmen's Compensation Act as indicated by the Fourth District Appellate Court of the State of Illinois?

The court reasons that petitioner could not be a seaman because he was only aboard the vessel when it was "anchored." A dredge can only perform its primary function when, to adopt the terminology of the court, it is "anchored." When the dredge is not "anchored" it is not, so to speak, working. The true test is whether or not the vessel is in navigation, and a dredge when it is "anchored" and dredging is just as much in navigation as a cargo ship crossing the Atlantic. It follows that the operating personnel of the dredge, i. e., the operator, engineer, oiler and deckhand, are all aiding in the navigation of the vessel.

Both respondent and the Appellate Court assumed that the James Wilkinson was a "vessel." Since this is true then when the vessel is performing the work for which she is designed, whether "anchored" or sunk to the bottom of the ocean as in **Gianfala v. Texas Co.**, she is in navigation. If these two premises are accepted, then the position of the Appellate Court becomes untenable, for how can a vessel be in navigation without a crew? If she has a crew, who are the members of the crew? They are those on board to aid the vessel in the performance of the work for which she was designed; those who conduct the dredging operation, including the petitioner who did everything aboard but operate and maintain the machinery. As was said in **Norton v. Warner Co.**, 321 U. S. 565, at 572, 64 S. Ct. 747:

"His (functions) were indeed different from the functions of any other 'crew' only as they were made so by the nature of the vessel and its navigational requirements."

CONCLUSION.

For the reasons stated, we respectfully submit that the judgment of the Fourth District Appellate Court of the State of Illinois be reversed and the judgment of the trial court be reinstated.

Respectfully submitted,

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IN THE
SUPREME COURT OF THE UNITED STATES.

OCTOBER, TERM, 1956.

No. 62.

JACOB SENKO,
Petitioner,

vs.

LaCROSSE DREDGING CORPORATION,
Respondent.

On Writ of Certiorari to the Appellate Court of the
State of Illinois, Fourth District.

REPLY BRIEF FOR PETITIONER.

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IN THE
SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1956.

No. 62.

JACOB SENKO,
Petitioner,

vs.

LaCROSSE DREDGING CORPORATION,
Respondent.

On Writ of Certiorari to the Appellate Court of the
State of Illinois, Fourth District.

REPLY BRIEF FOR PETITIONER.

ADDITIONAL STATEMENT OF THE CASE.

Petitioner deems it necessary to clarify certain statements in respondent's "Statement of the Case." Respondent states that when dredging operations were begun on the canal project in 1947, at a point north of Lock 27, the dredge had to "plow its way through," because the depth of the water was insufficient. This may have been the situation in 1947 when the respondent's dredge came into

the north end of the canal to dredge out the lock area, but it was not true in November of 1951, and for some time prior thereto, at which time the locks had been substantially completed.

Although, as respondent says, the canal project itself may not have been open for river traffic until February, 1953, still the locks were being operated with temporary controls prior to the date of the accident for the purpose of letting equipment in and out the lock gates (R. 57-58).

Respondent also states that the slough had never been used for trade, travel or commerce, and in his argument (p. 16) says that witness Sanders and others agreed that it had never been so used, but witness Sanders testified that in his youth he had helped take logs down the river and on the return trip they would go through Gabaret Chute, using it as a shortcut (R. 14). It had also been used by boats and barges hauling mules, coal wagons and livestock from the mainland to the island (R. 14, 79, 84, 94, 95).

Respondent says that at times Senko worked on the land driving stakes, cleaning mud from tractor treads and other similar jobs. He then argues that Senko's duties were partly on land and partly on water and were not confined to the dredge; that his duties on the dredge were intermingled with shore duties, such as shifting pipes, setting stakes on the shore and cleaning mud from the tractors (Res. Brief pp. 4, 10, 11). He bases this statement and argument on the testimony of petitioner Senko and witness Lakin (R. 127, 128, 111).

Senko was asked on cross-examination if he "sometimes" did not clean the treads on tractors, and his answer was, "That's when I was working there them four weeks; when I was filling up the fuel oil." This answer referred to a previous answer given on direct examination (page

253 of the original transcript) where he testified that in 1952, after the accident, he went back to the locks and got four weeks' work oiling tractors for respondent.

Witness Lakin, on behalf of respondent, testified on direct examination (R. 127) that at one time Senko helped him drive stakes and dig holes. He stated that this was prior to November 5th, 1951, but under cross-examination this witness did not know whether this incident occurred a month before Senko was hurt; a year before Senko was hurt or whether it was a month after Senko was hurt (R. 136); nor did this witness state that petitioner worked on and off the dredge at the time that he was doing this work for him. Prior to the accident Senko's duties were confined to the dredge except when he went ashore on dredge business (R. 15, 17, 31, 44, 46, 103, 108).

ARGUMENT.

The Dredge Was Operating on Navigable Waters of the United States.

We cannot concur with defendant that it was necessary that the dredge be "plying" in navigable waters, assuming that defendant means "plying" to be a movement up and down the body of water. To support his contention that the vessel must be "plying" in navigable water, he cites **Desper v. Starved Rock Ferry Co.**, 188 Fed. 2d 177, (7th Cir., 1951). The court in that case pointed out that they did not interpret nor did they take any of the other cases cited to interpret the term "plying" in navigable waters to mean that the vessel must actually be in motion on navigable waters. The court said at page 181 of the opinion:

"The phrase plying in navigable waters is not, we believe, to be construed to mean that the vessel must at the very moment of the injury have been actually in motion upon navigable waters but is rather to be interpreted as meaning that the person injured must have been a member of the crew of a vessel which was engaged in navigation as distinguished from one which had been withdrawn from navigation."

The authorities cited by defendant on the question of "navigability" actually support plaintiff's contention that the waters were navigable waters of the United States. From the case of **"The Daniel Ball,"** 10 Wall. U. S. 557, 563, 19 L. Ed. 998, at page 1001, defendant cites the following definition of navigable waters:

"Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used or are

susceptible of being used in their ordinary condition as highways for commerce over which trade and travel are or may be conducted in the customary modes of travel and trade on water." (Emphasis added.)

This definition is somewhat extended by the court in **United States v. Appalachian Electric Power Company**, 311 U. S. 377, at 407, where the court added this proviso:

"To appraise the evidence of navigability on the natural condition of the waterway is erroneous. Its availability for navigation must also be considered." (Emphasis added.)

The court continued to say, at page 407:

"Natural and ordinary condition refers to volume of water, the gradients and the regularity of the flow. A waterway otherwise suitable for navigation is not barred from that classification merely because artificial aid must make the highway suitable for use before commercial navigation may be undertaken." (Emphasis added.)

The court here based its determination upon the question of whether or not a particular waterway can, by the expenditure of a reasonable amount of funds by the federal government, be turned into a factually navigable stream. That this is true in the case before us now was evidenced by the testimony of A. M. Thompson, Jr., Vice President of the LaCrosse Dredging Company, that the canal project was built as a component part of a project to by-pass the Chain of Rocks reach of the Mississippi River (R. 39).

On the 1st day of November, 1951, and for many years prior thereto, Gabaret Chute, which later became known as the Chain of Rocks Canal, was in fact "Navigable waters of the United States." There was ample testi-

mony in the record to support this contention. The witness, Sanders, testified that years ago when he first started his activities as a river man, he had brought small boats through the chute on returning to Alton from St. Louis (R. 14). There was testimony by the witness, Beckman, that pleasure boats and barges, hauling coal to the water works on Chouteau Island had used Gabaret Chute. There was testimony that the settlers and farmers on Gabaret Island had used a ferry to gain access to the island for themselves, their stock and their supplies (R. 95, 96, 97, 86). More currently, there was undisputed evidence that from the time of the commencing of the canal project commercial traffic moved in and out of the south mouth of the canal (R. 73, 74, 79, 80, 57, 58). Based upon these facts and upon the other evidence before the jury we feel that the verdict of the jury in determining that these waters were navigable should be sustained by the court.

It is interesting to note that Gabaret Slough had been the subject of litigation as early as 1917. The case of Weber v. City Water Company of East St. Louis and Granite City, 206 Ill. App. 417, describes the use of a ferry across the slough from Gabaret Island to the mainland. The court there said at page 418:

"It appears from the record in this case that the Niedringhaus trustees and the appellant are the owners of an island known as Gabaret Island, consisting of about 1,840 acres, which island is formed by a slough coming out from the Mississippi River and extending around and back again into the river, and the slough is on the east, or Granite City, side of the island, and the Mississippi River on the west. The slough varies in width from one hundred to two hundred feet and is of the depth of twenty feet in places. This island is cultivated and used by the Niedringhaus trustees, except the forty acres belonging to

appellant, and its waterworks are located upon the forty-acre tract and is operated by appellant. Appellant and the Niedringhaus trustees used and operated a boat of the length of about sixty feet and the width of about forty feet with aprons of the length of about eight feet extending out at each end."

**Under F. E. L. A. the Court Does Not Necessarily Decide
Whether or Not the Work Is Interstate.**

Respondent, in his brief (p. 19) states that this court and all courts have held uniformly that the ultimate determination of the question of interstate commerce in a F. E. L. A. case is not decided by the jury but by the court. We submit that the law in such a situation is no different than the position taken by petitioner in his brief, that is, " * * * the jury is entitled to weigh the evidence and reach their own conclusion. The resulting verdict must stand if it is supported by any probative evidence."

This very contention was raised by the Railroad Company in the case of **Southern Railway Company v. Lloyd**, 239 U. S. 496. The court said at page 501:

"It is insisted that the trial court should have given the instruction requested by the Railroad Company to the effect that upon the facts shown the plaintiff was not engaged in interstate commerce at the time of his injury. Upon this subject there is testimony in the record to support the allegations of plaintiff's petition and the charge to the jury as given. The trial court charged that in order to recover, the burden was upon the plaintiff to show that at the time he received his injury he was engaged in interstate commerce. In refusing the request asked, and leaving the issue to the jury, the trial court committed no error, and the Supreme Court of the State rightly affirmed the judgment in that respect."

Also see Penn. Company v. Donat, 239 U. S. 50, where this court held in a memorandum opinion that this issue was probably submitted to the jury.

Respectfully submitted,

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IN THE
SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1955

No. 250-42

JACOB SENKO,
Petitioner,

vs.

LACROSSE DREDGING CORPORATION,
Respondent.

On Petition for a Writ of Certiorari to the Fourth District,
Appellate Court of the State of Illinois.

BRIEF FOR RESPONDENT IN OPPOSITION.

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IN THE
SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1955.

No. 853.

JACOB SENKO,
Petitioner,

vs.

LaCROSSE DREDGING CORPORATION,
Respondent.

Appellate Court of the State of Illinois.
On Petition for a Writ of Certiorari to the Fourth District,

BRIEF FOR RESPONDENT IN OPPOSITION.

The judgment of the Appellate Court of Illinois for the Fourth District (hereinafter called Appellate Court) was based upon undisputed facts which made it legally necessary for that Court to enter judgment for respondent. The judgment was and is correct. There is no proper legal basis or any special and important reason for this Court to review that judgment and the petition for a writ of certiorari should be denied.

THE QUESTIONS PRESENTED FOR REVIEW.

Petitioner requests this Court to review the Appellate Court's judgment on the theory that the jury, by its verdict, necessarily concluded he was a seaman and since it settled a disputed question of fact the Appellate Court had no legal right to reverse the trial court's judgment entered on such verdict. Petitioner overlooks the circumstance, which the Appellate Court and the Supreme Court of Illinois did not, that there was no significant dispute about the facts of petitioner's duties and conditions of employment which the jury was called upon to decide. The question presented to the Appellate Court, the Supreme Court of Illinois, and now to this Court, is whether the law as applied to such undisputed facts, warrants the conclusion that petitioner was a seaman and therefore entitled to recover under the Jones Act.

Respondent urged the Appellate Court to reverse the trial court's judgment for the additional reasons that petitioner had failed to prove that respondent was negligent and had made an unrevoked stipulation with respondent before the Industrial Commission of Illinois that the Illinois Workmen's Compensation Act was applicable to his accident. The uncontroverted evidence that petitioner was not a seaman made it unnecessary for that court to consider or reverse the trial court's judgment for these reasons.

STATEMENT OF THE CASE.

Petitioner, as he did in the Appellate Court and the Supreme Court of Illinois, attempts to lend the suggestion of navigation to his employment by referring repeatedly to the "soundings" which he took (pages 7, 11, 12), the "shore party" (pages 7, 11, 12), the "dredge crew" (page 12), and the "dredge tender" (page 7). The "soundings"

had nothing whatever to do with the navigation of the dredge, as the Appellate Court noted, and were made solely for the purpose of enabling the operator to know how deep to dig. As petitioner put it (Abs. 95):

“I would take the soundings to see how deep the dredge cut out the bottom. That is what I would do when I took those soundings.”

The “dredge tender” was a small row boat which petitioner pushed across the 10 to 15 feet of water which separated the stationary dredge and the bank on the night of his accident (Abs. 96). The “shore party” was a “fellow who called” for one of the lanterns which petitioner took with him from the dredge (Abs. 89). The “dredge crew” were the oiler, operator, engineer and laborer, none of whom were “members of the crew,” because none was aboard the dredge primarily to aid in its navigation.

Petitioner’s statement does not in any manner controvert these undisputed facts regarding petitioner’s employment by respondent and the services which he performed:

- (a) He was a member of the common laborers’ union, had worked for many building contractors as a laborer on construction work, and had never done work other than that of a laborer (Abs. 93);
- (b) He did not at any time belong to the National Maritime Union, the Marine Engineers Benevolent Association or the Master Mates and Pilots, which unions have jurisdiction over seamen (Abs. 95);
- (c) He signed no ships’ articles, lived at Mt. Olive, Illinois, more than 40 miles from his work, drove back and forth each day, and ate and slept at home at night (Abs. 95, 94).
- (d) He was under the direction of a steward of the laborers’ union who had jurisdiction of all other laborers on the job. His superior was either respondent’s superin-

tendent or assistant superintendent, neither of whom was "master" of the dredge Wilkinson and both of whom had an office or headquarters on land (Abs. 95, 45);

(e) The dredge had no "master," ~~mate or~~ pilot (Abs. 95). It did have an operator, who handled the controls on the cutterhead and pumps; an engineer, who took care of the engines which operated the pumps and cutterhead; and an oiler, who oiled these engines. The employees were not "signed on" the dredge, were members of the Operating Engineers Union, a building crafts union, were paid by the hour, lived on land, and ate and slept at home each night (Abs. 81, 46, 36, 37, 38);

(f) The dredge was not self-propelled, had no sleeping quarters and no facilities for preparing meals (Abs. 37, 94);

(g) The dredge at times was moved by tugs from one location to another, but petitioner was never on the dredge when it was so moved (Abs. 96);

(h) Neither he, the operator, oiler, nor engineer required any training or license in navigation to qualify for and to do their jobs (Abs. 39, 40);

(i) He was paid \$2.00 an hour and time and one-half for work which he did in excess of 8 hours in one day and 40 hours in one week (Abs. 45, 46, 94); and

(j) He and the other employees on the dredge looked to respondent and not to the dredge, or its earnings, for their wages (Abs. 45).

Although the duties, skills and working conditions of seamen, including deckhands, employed on vessels plying the Mississippi River and other navigable inland waterways, on and prior to November, 1951, were proved by uncontroverted evidence, petitioner makes no reference thereto in his statement. These facts show:

(a) Such vessels are manned by pilots, or masters, licensed engine room crewmen, unlicensed deckhands, and galleyhands (Abs. 110);

(b) The pilots, engine-room crewmen, deckhands and galleyhands are respectively members of and represented by the Master Mates and Pilots Union, the Marine Engineers Benevolent Association, and the National Maritime Union, all seamen's unions (Abs. 111);

(c) They are signed on to the vessel on which they work, live and take their meals on board (at the vessel's expense) and have laundry facilities and lounging quarters on the vessel (Abs. 112, 113);

(d) They stand two watches a day of six hours on and six hours off duty, are paid a monthly salary and receive no premium pay for overtime work (Abs. 112, 113);

(e) They must be able to splice lines and cables, operate winches, have knowledge and an understanding of navigation rules and signals. They are required to understand the meaning of buoy lights and running lights on approaching vessels in order to guard the safety of the vessel while it is in navigation (Abs. 111, 113, 114);

(f) They must know how to make up a tow consisting of as many as 18 to 20 barges, to place running lights, and to maintain searchlights in good working order. They stand watch on the front of a tow in bad weather to transmit signals to the pilot, and, when required, they must be able to operate bilge pumps to remove water from the hold of the vessel (Abs. 111, 112).

Although petitioner was required to be a seaman in order to come within the provisions of the Jones Act and to recover in this suit, the undisputed evidence showed he neither possessed nor exercised any of the skills and abili-

ties required of and exercised by seamen aboard vessels plying the navigable inland waterways of the United States. His work, skill, manner and amount of payment was that of a land-based laborer and he was injured while entering a doorway of a shelter on land maintained there for him and other laborers (Abs. 43, 97).

While petitioner now characterizes himself as a seaman he clearly indicated at the trial he did not so regard himself by stating he "didn't know what it was in the first place" (Abs. 123).

ARGUMENT.

I.

The Facts Regarding Pétitioner's Status as a Seaman Were Undisputed and the Appellate Court Was Required by Law to Enter Judgment for Respondent.

The uncontroverted facts proved:

(1) Petitioner was not a member of the crew of the dredge since he was not aboard for the primary purpose of aiding in its navigation; and

(2) The dredge was not in navigation or plying in navigable waters.

1. Section 33 of the Merchant Marine Act of 1920, commonly known as the Jones Act (Title 46, U. S. C. A., Section 688), was enacted June 5, 1920, and provided in part that:

"Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law" * * *.

From June 5, 1920, until the Longshoremen's and Harbor Workers' Compensation Act [Title 33, U. S. C. A., Section 902 (3)] was passed on March 4, 1927, "seaman" was construed to mean both casual workers on navigable waters, such as longshoremen and harbor workers, as well as the master and members of a crew of a vessel who were on board primarily to aid in the vessel's navigation. All such employees were considered to be seamen and to have a right of action against the owner of a vessel for injuries sustained as a result of negligence of the master or members of the crew of the vessel (**Beadle v. Spencer**, 298 U. S. 124, 80 L. Ed. 1082, 56 S. Ct. 712; **International Stevedoring Company v. Haverty**, 272 U. S. 50, 71 L. Ed. 157, 47 S. Ct. 19).

After passage of the Longshoremen's and Harbor Workers' Compensation Act, which provided fixed compensation for casual maritime workers and excluded a master and member of the crew of a vessel from its coverage, "seaman," under the Jones Act, was construed to mean only a master or member of a crew of a vessel plying in navigable waters (**South Chicago Coal and Dock Co. v. Bassett**, 309 U. S. 251, 84 L. ed. 732, 60 S. Ct. 544). Petitioner, therefore, in order to have the status of a "seaman," within the meaning of the Jones Act (since the dredge Wilkinson had no "master") was required to prove he was a member of the crew of the dredge and that it was plying in navigable waters.

1) **A Member of a Crew of a Vessel Is One Who Is Aboard for the Primary Purpose of Aiding in Its Navigation.**

In **Seneca Washed Gravel Corporation v. McManigal** (C. A. 2d), 65 F. 2d 779, the court defines "crew" as, p. 780:

"The word 'crew' is used in the statute to con-
note a company of seamen belonging to the vessel,
usually including the officers. It is the 'ship's com-
pany.' **U. S. v. Winn**, 28 Fed. Cas. 733, No. 16, 740.
The crew is usually referred to and is naturally and
primarily thought of as those who are on board and
aiding in the navigation without reference to the
nature and arrangement under which they are on
board." (Emphasis supplied.) (Authorities.)

The court defined "crew" in the **Bound Brook** (D. C. Mass.), 146 Fed. 160, 164, as:

"When the 'crew' of a vessel is referred to, those
persons are naturally and primarily meant who are
on board her aiding in her navigation," * * *

The Buena Ventura (D. C. N. Y.), 243 Fed. 797, 799, is
to the same effect.

In **Anderson v. Olympian Dredging Co.** (D. C. Calif.), 57 F. Supp. 827, a laborer who was listed as a mate, but whose duties were watching the pipe line, operating the engine on the barge, rigging the equipment on the barge (which was not self-propelled), and who worked by the day, and ate and slept on shore, was not a "member of the crew" because, p. 828:

"It cannot be said that he was naturally and primarily on board the vessel to aid in her navigation, * * *."

In **Frankel v. Bethlehem-Fairfield Shipyard** (C. A. 4th), 132 F. 2d 634, a workman engaged in working on a ship launched but not completed and lying in navigable waters was not a "member of the crew" of the vessel because, p. 636:

"his duties had no direct relation to navigation."

Diomede v. Lowe (C. A. 2d), 87 F. 2d 296, affirms and quotes the definition of "crew" (p. 298) in the **Seneca Washed Gravel Corporation** case quoted above, while in **Wilkes v. Mississippi River Sand & Gravel Company** (C. A. 6th), 202 F. 2d 383 (cert. den. 346 U. S. 817, 98 L. ed. 344, 74 S. Ct. 28), the court in discussing who is a "member of the crew" said, p. 388:

"It would seem that the several tests under the Jones Act should be derived from the cases of **South Chicago v. Bassett**, supra; **Norton v. Warner Co.**, supra; **Maryland Casualty Co. v. Lawson**, 5 Cir., 94 F. 2d 190; **A. L. Mechling Barge Line v. Bassett**, 7 Cir., 119 F. 2d 995; **Garumbo v. Cape Cod S. S. Co.**, supra; and as set forth in **Rackus v. Moore-McCormack Lines, Inc.**, D. C., 85 F. Supp. 185, namely, (1) that the vessel be in navigation; (2) that there be more or less permanent connection with the vessel; and (3) that the worker be aboard primarily to aid in navigation." (Emphasis added.)

There is no dispute that petitioner was not aboard the dredge Wilkinson "primarily to aid in its navigation." The dredge, in fact, had never been engaged in navigation. It was simply a floating piece of earth-moving equipment which, although capable of the characterization of "vessel," had never been employed in navigation.

In order for petitioner to have been a "member of the crew" of the dredge Wilkinson, it was necessary that he be aboard to aid in its navigation. To be in navigation the dredge must "have been plying in navigable waters" of the United States.

2) The Dredge Wilkinson Was Not in Navigation or Plying in Navigable Waters.

Although petitioner charged in his amended complaint that the dredge was "operated on navigable waters of the United States in Madison County, Illinois," there is no evidence in the record that the water in which the Wilkinson was stationed was navigable water or that the Wilkinson was "plying" in such water.

In **Desper v. Starved Rock Ferry Company** (C. A. 7th), 188 F. 2d 177 (aff'd 342 U. S. 187, 96 L. ed. 205, 72 S. Ct. 216), after referring to the opinion in **Swanson v. Marra Brothers**, 328 U. S. 1, 90 L. ed. 1045, 66 S. Ct. 869, the court said, p. 180:

"This decision clearly demonstrates that, since the passage of the Longshoremen's Act, the Court has retreated from the position taken in the **Haverty** case and has narrowed the Jones Act concept of 'seaman' to the point where it includes only one who is a member of the crew of a vessel plying in navigable waters." (Emphasis supplied.)

In **Posavec v. Merritt-Chapman and Scott Corporation** (D. C. N. Y.), 106 F. Supp. 170, 171, plaintiff's son, who was employed as a night watchman on board the defend-

ant's gravel and sand barge, was killed when the craft capsized. Citing the **Marra Brothers case** the court said:

"This statute (the Jones Act), as it has been interpreted by the courts, is applicable only to those persons who are officers or the members of a crew of a vessel that operated on navigable waters."

The court held that the decedent was not a person who was within the protection of the Jones Act because he was not a member of the crew.

The court in **Finnie v. Pittsburgh Coal Company** (D. C. Penn.), 97 F. Supp. 721, 722, said:

"In the Swanson case, the court held that only members of a crew of a vessel **plying in navigable waters** could avail themselves of the Jones Act, in view of the provisions of the Longshoremen's and Harbor Workers' Compensation Act * * *." (Emphasis supplied.)

Webster's New International Dictionary, Second Edition, defines "plying" as:

"To go or travel more or less regularly back and forth (between), as, the steamer plies between two cities."

The American College Dictionary contains this definition:

"To traverse (a river) (etc.), esp. on regular trips.

"To drive or run regularly over a fixed course or between places, as a boat, a stage (etc.)."

The dredge Wilkinson was not "plying in navigable waters," for, as the Appellate Court found and petitioner testified, it was "fastened some way to the shore" (Abs. 95). It was a stationary earth-moving dredge. It had on occasions been towed from one location to another as its dredging work at a particular site was completed. It had

never, however, traveled "more or less regularly back and forth" between any locations and had not consequently at any time been engaged in "plying" in navigable waters.

Although petitioner states at page 11 of his petition "he did accompany her (the dredge) on whatever travels she did make," he testified on the trial:

"I don't know whether it was necessary to tow or push the dredge when it was moved from one place to another, because I wasn't there" (Abs. 95).

"I was never working on the dredge when it was moved from one area to another" (Abs. 96).

A) The Water in Gabaret Slough, in Which the Dredge Was Excavating on November 5, 1951, Was Not Navigable Water.

Gabaret slough, prior to November 5, 1951, had never been used as a "highway for commerce, over which trade and travel were conducted in the customary modes of trade and travel on water." Absent such use the slough did not constitute navigable water. Navigable waters are defined by this Court to be, **The Daniel Ball**, 10 Wall. (U. S.) 557, 563, 19 L. Ed. 999, 1001:

"Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used or are susceptible of being used in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water."

In **Iowa-Wisconsin Bridge Company v. U. S.** (Ct. of Claims), 84 F. Supp. 852 (cert. denied, 339 U. S. 982, 94 L. ed. 1386, 70 S. Ct. 1020), it is stated, p. 866:

"The rule in this country has been, and as far as we can tell, still is, that navigability is a fact which

must be proved and the proof must consist of evidence that the watercourse in question is either used or is susceptible of use in its ordinary condition, as a highway of commerce over which trade and travel are or may be conducted in the customary modes of trade and travel on water. **The Daniel Ball**, 10 Wall. 557, 563, 19 L. ed. 999."

The court added:

"The plaintiff has referred us to numerous cases and we have found others, in which sloughs, admittedly a part of navigable bodies of water, have been held not navigable themselves because they served no useful commercial service to the public." (Authorities.) (Emphasis supplied.)

The court concluded the sloughs, although joining the Mississippi River, were not "navigable waters" because, p. 867: "The sloughs have never served any useful commercial purpose."

In **Harrison v. Fite** (C. A. 8th), 148 Fed. 781, 783, the court said:

"To meet the test of navigability as understood in the American law a watercourse should be susceptible of use for purposes of commerce or possess a capacity for valuable floatage in the transportation to market of the products of the country through which it runs. It should be of practical usefulness to the public as a public highway in its natural state and without the aid of artificial means.

"* * * Mere depth of water, without profitable utility, will not render a watercourse navigable in the legal sense, so as to subject it to the public servitude, nor will the fact that it is sufficient for pleasure boating or to enable hunters or fishermen to float their skiffs or canoes. To be navigable a watercourse must

have a useful capacity as a public highway of transportation" (Authorities). (Emphasis supplied.)

To the same effect are **North American Dredging Co. of Nevada v. Mintzer** (C. A. 9th), 245 Fed. 297, and **Levoy v. United States**, 177 U. S. 621, 44 L. ed. 914, 20 S. Ct. 797.

All of the witnesses testifying to the use made of the slough agreed that it had never been used for trade, travel or commerce.

William Sanders said (Abs. 36):

"I never saw any river traffic that went through there such as barges, river boats or anything of that kind. As far as my knowledge and experience is concerned, there was never any river traffic that went through there."

Dale Skeen, who was familiar with the slough for 35 or 40 years, testified (Abs. 60):

"There wasn't any river traffic going through there that I can recall. While the slough was used for swimming and fishing and rowboats, I've never seen any river traffic or barge tows, or large vessels or excursion vessels come through there, if that's what you mean. It wasn't used for river commerce or traffic."

Clifford Stevens, who had been familiar with the slough for 35 years, testified (Abs. 63, 64):

"In the years that I have been acquainted with the slough there were areas where even a rowboat couldn't travel.

"I never saw any other small craft in the slough other than the rowboats."

Gabaret slough was never susceptible of or used as a public highway of transportation. It was not in its natural state, and without the aid of artificial means, of any prac-

tical usefulness to the public as a means of carrying on trade or commerce in the customary modes of trade and travel on water. It was not until after it had been converted to a navigable canal capable of such use that it became a navigable body of water. Petitioner was injured on November 5, 1951. The canal was not completed and opened to traffic until February 7, 1953 (Abs. 52). At the time of petitioner's injury the dredge Wilkinson was not on or plying on navigable waters of the United States. It was in fact floating in an artificial basin created in large part by its own work. As said in **Kibadeaux v. Standard Dredging Company** (C. A. 5th), 81 F. 2d 670, 672 (cert. den. 299 U. S. 549, 81 L. ed. 404, 57 S. Ct. 11):

“Indeed, injuries occurring on waters which are to become navigable after the dredge cuts the channel, but which have never been navigated before, could hardly be said to occur on navigable waters at all.”

Petitioner alleged as an essential basis for his recovery that the dredge Wilkinson was operated on navigable waters of the United States at the time of his injury. It was not, and the Appellate Court was required, as it did, to enter judgment for respondent.

Petitioner states at page 5 of the petition that the slough “had also been used commercially by boats and barges hauling mules, coal wagons and other livestock from the mainland to Gabaret Island.” The record shows, however (Abs. 86, 87, 88), the “commercial use” of the slough consisted of crossing it by “a ferry” which was pulled from one side of the slough to the other, a distance of about 200 feet, when the Mississippi River was flooding and when the roadway across the slough could not be used. The road had extended through the slough for approximately 56 years (Abs. 84, 86) and the only time mules, coal or livestock were taken from one side of the slough to the other “was when the river was in flood stage” (Abs. 86). Such

limited emergency use of a boat to cross a swollen slough can hardly be said to make the slough a highway for commerce over which "trade and travel are conducted in the customary modes of trade and travel on water." **The Daniel Ball**, 10 Wall. (U. S.) 557, 563, 19 L. ed. 999, 1001.

The Cases Relied on by Petitioner.

Petitioner relies upon three Courts of Appeals cases and the opinion of this Court in **Gianfala v. The Texas Co.**, 350 U. S. 879, to support his contention that he was a seaman and a "member of the crew" of the dredge. (**Gahagan Construction Company v. Armao** [C. A. 1st], 165 F. 2d 301; **McKie v. Diamond Marine Co.** [C. A. 5th], 204 F. 2d 132; **Summerlin v. Massman Const. Co.** [C. A. 4th], 199 F. 2d 715.)

While the undisputed facts make it unmistakably clear that petitioner, as a matter of law, could not be a "member of the crew" of the dredge Wilkinson, the following comment about these cases may be made.

In the **Gahagan case** the vessel involved had accommodations for preparation of meals and sleeping quarters. It was brought from New York to Boston with eleven men on board, all of whom slept and ate thereon. Plaintiff testified that he was hired as a seaman and told to take orders from the captain and the mate of the dredge. He performed duties of picking up its line, repairing it, fixing anchors, and setting up navigation lights. In addition, at times he worked on the tugboat which moved the dredge.

Although the tide rose only four hours out of twelve, this was a regular movement which made the water where the vessel was working navigable eight hours out of each twenty-four. The dredge was so far out in the water of the harbor that it took 15 or 20 minutes to bring plaintiff to shore by the tugboat after he was injured.

The **Summerlin case** was decided on the pleadings and the facts are not detailed. The Court described them as comparable to those in **Jeffery v. Henderson Bros.** (C. A. 4th), 193 F. 2d 589. In that case the vessel was licensed for coastwide trade, was moved every day on the navigable waters of the Ohio River and its movements were made in compliance with the rules of navigation governing the movement of river traffic.

In the **McKie case**, plaintiff had "followed the sea" for many years, held a tanker man's license, and was required to operate the dredge tender, a 25-foot motor vessel, which was used to tow the dredge to various locations in and out of Tabb's Bay off the Texas coast. Plaintiff consequently "worked at whatever travel there was by this vessel" and was to that extent engaged in navigation.

In the **Gianfala case** the accident occurred on the navigable waters of the Gulf of Mexico while the deceased employee was engaged in unloading pipe from one barge to another. All employees worked six days on duty and six days off and were transported to and from the barges by speedboats and the deceased had moved with the barge on navigable waters of the Gulf of Mexico on at least ten or twelve occasions.

The decision of this Court in **South Chicago Coal and Dock Co. v. Bassett**, 309 U. S. 251, 84 L. ed. 732, 60 S. Ct. 544, makes petitioner's contention that he is a seaman untenable. This Court in that case affirmed the judgment of the Court of Appeals, which in reversing the judgment of the District Court holding plaintiff's intestate was a member of the crew, said, 104 F. 2d 522, 528:

"In either case the facts are not in dispute. Therefore, on undisputed evidence, is the finding, which we might call a conclusion, that the deceased was a seaman, consistent with the undisputed facts?

"Convinced as we are that the evidence establishes a non-seaman status, it followed that the court erred in holding to the contrary."

Petitioner, to be a "seaman" under the Jones Act, was required to prove he was a "member of the crew" of the dredge Wilkinson. The undisputed evidence showed as a matter of law he was not, for:

(1) He was not aboard the dredge "primarily to aid in its navigation," because:

(a) the dredge was not engaged in navigation since it was not "plying in navigable waters," but was stationed at a given location performing its function of excavation; and

(b) the artificial basin which it was digging was not a navigable water of the United States because it was a part of a slough which had never been used as a "highway for commerce." Under such circumstances the Appellate Court had no alternative but to enter judgment for respondent. In so doing it did not invade the jury's province to decide factual issues. It simply made a proper application of the law to the undisputed facts. That it was proper for it so to do is well illustrated by **Desper v. Starved Rock Ferry Co.**, 342 U. S. 187, 96 L. ed. 205, 72 S. Ct. 216. In this case a jury found plaintiff's intestate was a member of the crew of a vessel and awarded plaintiff \$25,000.00. The Court of Appeals (C. A. 7th) reversed the District Court's judgment on this verdict and held plaintiff's intestate was not a member of the crew of a vessel and could not recover under the Jones Act. This Court affirmed the judgment of the Court of Appeals. In **Zientek v. Reading Company** (C. A. 3rd), 220 F. 2d 183, the trial court found plaintiff was a member of a crew in a suit brought under the Jones Act. The Court of Appeals reversed the District Court's judgment on this verdict and said, page 186:

"Since there was no evidence upon which a jury could have found that appellee was a crew member

of any vessel, the judgment will be reversed with directions to dismiss the action."

Petitioner was not a member of the crew of the dredge Wilkinson and there was and is no evidence upon which such a conclusion can be based. The Appellate Court properly so found.

This Court in **Warner, Admx., v. Goltra**, 293 U. S. 155, 79 L. ed. 254, 257, 55 S. Ct. 46, said:

"In a broad sense, a seaman is a mariner of any degree, one who lives his life upon the sea."

Petitioner, as a laborer who worked both on and off the stationary Wilkinson, was indeed remote from the "seaman" defined by this Court. He was equally remote from those seamen who ply the navigable inland waterways of the United States and who have training in navigation principles, stand watch, make up tows, read and transmit buoy signals, understand running lights, splice cables, maintain searchlights, operate bilge pumps, live aboard their vessels, receive a monthly salary, belong to and have representation by maritime unions, and whose principal purpose aboard their vessel is to aid its navigation.

There was nothing maritime about petitioner or his work. He was a land laborer who had non-navigation duties to perform on a dredge stationed on non-navigable water and who was, in performing his duties on land, injured as he claims, as the result of respondent's alleged negligence in operating a stove in a building on land.

CONCLUSION.

The law and the undisputed evidence made it necessary and proper for the Appellate Court to enter judgment for respondent. It had no alternative. Its judgment was and is correct. It might well have decided the case for respond-

ent because of petitioner's failure to prove respondent was negligent, or because petitioner had made an unrevoked stipulation with respondent before the Industrial Commission of Illinois that the Illinois Workmen's Compensation Act was applicable to his accident. The uncontroverted evidence that petitioner was not a seaman made this unnecessary.

The judgment of the Appellate Court was and is correct. There is no proper legal basis or any special and important reason for this Court to review that judgment. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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IN THE
SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1956.

No. 62.

JACOB SENKO,
Petitioner,

vs.

LaCROSSE DREDGING CORPORATION,
Respondent.

On Writ of Certiorari to the Appellate Court of the
State of Illinois, Fourth District.

BRIEF FOR RESPONDENT.

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IN THE
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On Writ of Certiorari to the Appellate Court of the
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BRIEF FOR RESPONDENT.

QUESTIONS PRESENTED FOR REVIEW.

- 1) Is a dollar verdict of a jury immune from correction by a reviewing state court when that verdict is patently erroneous in reaching a conclusion which the law will not permit?
- 2) Can the general verdict of a jury amend the provisions of the Jones Act?

3) Can a coal miner and construction laborer, who receives his work assignment from a labor steward, who lives at home and commutes to the job site daily, takes his lunch to the job, is paid a laborer's hourly rate for 8 hours a day and 40 hours a week, and premium pay for other hours, all under a union labor contract, who works on a stationary dredge on non-navigable water, who has never been on the dredge when it was moved, and who is bumped by a job site superintendent while in a labor shanty on land kept for laborers, be held to be a member of a crew of a vessel because a jury determines he should recover money from his corporate employer?

STATEMENT OF THE CASE.

On November 5, 1951, respondent was engaged in dredging out Gabaret Slough which was to become a part of a canal then under construction in Madison County, Illinois. The slough ran more or less parallel to the Mississippi River and depending on the state of the water it connected at its ends with the river. The slough, although used for swimming, hunting and fishing, and by motor and row boats, had never carried any barges, excursion vessels or river commerce or traffic (R. 28, 75, 76, 83, 84). Respondent began dredging operations on the canal project in 1947 at a point north of Lock 27 (R. 41). In order to reach that area, Respondent's dredge had to "plow its way through" the slough because the depth of the water was insufficient to float the dredge. It was pushed by a small boat and at intervals of some 200 feet it was halted while it pumped mud and silt from the slough to make room for water to enable it to float (R. 27).

The dredging operations on the slough were done with a dredge, bulldozers, draglines, trucks and hand tools (R. 33, 146). The canal was not completed and opened to traffic until February 7, 1953 (R. 60).

On November 5, 1951, Respondent operated a dredge known as the James Wilkinson. It was, in fact, a barge on which a pump driven by a diesel motor was mounted. It could not move under its own power and was pushed or towed from place to place (R. 26). The dredge cut silt, sand or mud from beneath the surface of the water and pumped this material mixed with the water through pontoon lines to the land. This was done by a cutter-head and pumps operated by motors located on the dredge (R. 20, 21). This material when deposited on the bank was moved and shaped by trucks, draglines and hand tools (R. 33, 55).

The dredge Wilkinson was operated by an operator or lever man, engineer, oiler, and laborer (R. 17, 18). The operator handled the controls on the cutter-head and pumps, the engineer took care of the engines, the oiler oiled the machinery and the laborer (referred to by some of petitioner's witnesses as a deckhand) took tools, lanterns and supplies to and from the dredge to the land, cleaned up the dredge, filled the water cooler, and did miscellaneous jobs thereon (R. 17, 31, 32).

The operator, engineer and oiler were members of the Operating Engineers Union, a building crafts union (R. 25, 26, 29, 30). The laborer was a member of the Common Laborers Union (R. 47, 109). These employees were paid at a specified hourly rate and under contracts which respondent had with their unions, received premium pay for daily and weekly overtime hours (R. 30, 49). They signed no ship's papers before beginning work, did not live aboard the dredge, brought their own lunches, drove to and from work each day and required no training or license in navigation to qualify for and do their jobs (R. 49, 50, 30, 35).

The dredge had no "master," mate or pilot and neither Petitioner nor any other employee was "signed on" the

dredge (R. 113, 50). It was not self-propelled, had no sleeping quarters or facilities for preparing meals (R. 26, 30) and Petitioner and all other employees looked to Respondent and not the dredge or its earnings for their wages (R. 49).

Petitioner was 68 years of age. He lived at Mt. Olive, Illinois. He had been a member of the Laborers Union for nine years and worked for building contractors as a laborer on construction work near his home and elsewhere in Illinois (R. 110, 122). Before that he worked as a coal miner (R. 112). Because the construction job on which he had been working was completed he applied to the Laborer's Hall in Granite City for work and was sent to Respondent's job site on a "permit" issued by the Laborer's business agent at Granite City (R. 110). Although Mt. Olive is more than 40 miles from Granite City, Petitioner drove to and from his job each day. He did not belong to the National Maritime Union, the Marine Engineers Benevolent Association or the Master Mates and Pilots, which have jurisdiction over seamen (R. 112, 113). At times he worked on the land, driving stakes, cleaning mud from tractor treads and other similar jobs (R. 127, 128, 111). He worked under the jurisdiction of a "pusher" of the Laborer's Union, who assigned Petitioner and all other laborers to such jobs as they did for Respondent (R. 48, 113).

Senko was one of the laborers who was assigned by the "pusher" to work on the dredge Wilkinson (R. 48). He was subject to the direction of Respondent's Superintendent or Assistant Superintendent, who maintained an office at the job site. He began work at 3:30 P. M. and left at 11:30 P. M. (R. 51). He worked five days and 40 hours each week. He was paid \$2.00 an hour and overtime each hour over eight in any day and 40 in any week (R. 111, 112). He had no duties of navigation to perform on or off the dredge. He was never on the dredge when it was moved

from one location to another (R. 115). At times he placed or lighted lanterns on stakes for the purpose of enabling the operator to see where to dig after dark (R. 32).

Respondent built a wooden shed or shelter at the request of the Laborer's Union which it kept at the job site opposite the dredge (R. 134, 128). The shed contained a coal stove and some benches around the walls. At about 10:45 P. M., on November 5, 1951, Senko left the dredge and took two lanterns to the shelter (R. 116, 117). The dredge was about 15 feet from the land (R. 116). Senko got to the door of the shelter as another employee was entering. The stove fire flashed up when this employee put the contents of a coal bucket into the stove. He turned to run through the shelter doorway and in so doing ran into and knocked Petitioner to the ground (R. 119).

Respondent paid compensation to Petitioner under the provisions of the Workmen's Compensation Act of Illinois for his lost time, as well as for his hospital and medical expenses (Def. Ex. B, R. 179). Thereafter, Petitioner filed a claim with the Industrial Commission of Illinois to recover compensation for disability which he claimed as a result of his injury (Def. Ex. B, R. 178, 179). At a hearing held before the Industrial Commission of Illinois on February 4, 1953, Petitioner stipulated that he and Respondent were operating under the provision of the Workmen's Compensation Act of Illinois on November 5, 1951 (R. 125, 126). Neither this stipulation nor the award made to Petitioner for his injury has been set aside.

To contrast the laborer's tasks of Petitioner to those of a member of a crew of a vessel, Respondent made uncontroverted proof of the working conditions and duties of seamen on vessels plying the Mississippi River and other navigable inland waterways on and prior to November, 1951. Such vessels were manned by pilots (masters), licensed engine room crewmen, unlicensed deckhands and

galleyhands (R. 140). The pilots belonged to the Master Mates and Pilots Union (R. 140). The engine room crewmen were members of the Marine Engineers Benevolent Association, and the deckhands and galleyhands belonged to the National Maritime Union (R. 141). Seamen must be able to splice lines and cables, operate winches, act as lookout, know navigation rules, understand navigation signals, buoy lights and running lights on approaching vessels (R. 141, 145), and be able to make up a tow consisting of as many as 18 to 20 barges. They must understand the placement of running lights on tows, operate bilge pumps and maintain searchlights in good working order (R. 141, 142). Seamen stand two watches a day of six hours on and six hours off duty (R. 143). They sign onto the vessel on which they work, live aboard, receive meals at the vessel's expense, have laundry facilities and are provided lounging quarters aboard the vessel to relax when off duty. They receive a monthly salary and are paid no overtime pay for hours worked in excess of 8 in one day and 40 in one week (R. 143, 144, 145)..

Petitioner, although required to be a member of a crew of a vessel to recover in this suit, neither possessed nor exercised any of the skills and abilities required of and exercised by members of a crew of a vessel. His work, skill, manner and amount of payment were those of a land-based laborer. He was injured while entering a shelter on land maintained there for him and other laborers. Although he now characterizes himself as a seaman he admitted at the trial "he didn't know what it was in the first place" (R. 168).

SUMMARY OF ARGUMENT.

I.

A jury's dollar verdict cannot make Petitioner a seaman when the uncontroverted facts of his duties and employment make it legally impossible for him to be a member of a crew of a vessel. Petitioner lived on land (R. 103). He worked on land and on a stationary dredge fastened to the bottom of a slough (R. 127, 128, 111). He was injured on land (R. 119). His Superintendent was officed on land. Petitioner drove 80 miles a day on land to and from work (R. 112). He had worked a lifetime as a coal miner and construction laborer (R. 110, 122, 112). He didn't consider himself a seaman and didn't know what it was (R. 168). He belonged to the laborer's union, worked on a labor union "permit" (R. 110), and under a labor union contract at \$2.00 an hour, 5 days and 40 hours a week (R. 49). He had neither a seaman's duties, skills, nor risks.

II.

Petitioner was not a member of a crew. He was not on the dredge for the primary purpose of aiding in its navigation, for the dredge did not navigate. It had no means of propulsion and was attached to the bottom of the slough where it dug. Petitioner was never on the dredge when it was moved from one job site to another (R. 115).

The slough, when Petitioner was injured on November 5, 1951, was not navigable. It was never susceptible of or used as a highway for traffic or commerce until converted to a navigable canal on February 7, 1953 (R. 28, 76, 84). Absent such use the slough did not constitute navigable water. **The Daniel-Ball**, 10 Wall. (U. S.) 557, 19 L. ed.

999, 1001; **Iowa-Wisconsin Bridge Company v. U. S.** (Ct. of Claims), 84 F. Supp. 852 (cert. denied, 339 U. S. 982, 94 L. ed. 1386, 70 S. Ct. 1020). The stationary dredge was neither in nor plying in navigable waters. Petitioner under such circumstance could not be a member of its crew. **Swanson v. Marra Brothers**, 328 U. S. 1, 90 L. ed. 1045, 66 S. Ct. 869; **Desper v. Starved Rock Ferry Company** (C. A. 7th), 188 F. 2d 177 (Aff'd 342 U. S. 187, 96 L. ed. 205, 72 S. Ct. 216).

III.

Petitioner worked on land and on the dredge. He was injured on land and entitled to, paid and awarded state workmen's compensation (Def. Ex. B, R. 179). His situation is unlike the claimants' in the cases he relies upon. In **Gianfala v. Texas Company**, 76 S. Ct. 141, and all cases cited therein, the accident occurred on vessels in navigable waters and not on land. Affirming Petitioner's non-seaman status will not deny the provisions of the Jones Act to all dredge workers.

IV.

The Jones Act adapts the Federal Employers' Liability Act to seamen. Under F. E. L. A., the court and not the jury decides whether or not the work is interstate. When the evidence establishes the interstate character of a shipment, neither a general verdict nor special finding will prevent this Court from so holding. **Baltimore & O. S. W. R. Co. v. Burtch**, 263 U. S. 540, 44 S. Ct. 165, 166; **Southern Pacific Company v. Gileo**, 76 S. Ct. 952, 962.

The court determines "seaman" or "non-seaman status." The jury finds the facts not the conclusions. **Desper v. Starved Rock Ferry Co.**, 342 U. S. 187, 72 S. Ct. 216. A jury finding of negligence is different from determining

the applicability of the Jones Act. The cases of **Lavender v. Kurn**, 327 U. S. 645; **Tennant v. Peoria & Pekin Union Ry. Co.**, 321 U. S. 29, and **Harsh v. Illinois Term**, 348 U. S. 940, simply hold that where there is evidence of defendant's negligence, the question is for the jury. This proposition has no application to the issue presented here of what law should apply and what status in law does Petitioner occupy. The record clearly shows Petitioner had a non-seaman status and this Court should so decide now that certiorari has been granted. **Reed v. Pennsylvania R. Co.**, 76 S. Ct. 958.

ARGUMENT.

The Facts Regarding Petitioner's Status Were Undisputed and the Appellate Court Was Required by Law to Enter Judgment for Respondent. Petitioner Was Not a Seaman.

Petitioner hopes to convince this Court that he is a seaman, a member of the crew of a vessel operating on the navigable waters of the United States. He says that the jury returned a general verdict for him and against his corporate employer, which verdict cannot be disturbed, the Jones Act, the Longshoremen's Act and the State Compensation Act to the contrary notwithstanding. He would try to convince this Court that a jury's dollar verdict makes him a seaman, although the facts of his duties and employment are uncontroverted and are contrary to all of the law, custom and tradition which defines a seaman member of a crew.

One will search in vain for anything nautical in the record of this case. The petitioner was bumped and knocked down by a fellow worker running out the door of a shelter on land maintained there for employees. Petitioner lived at Mt. Olive some forty miles distant from the job site and he commuted daily by automobile, as he had done during a lifetime of work in the building construction industry and in coal mining.

The pattern of his daily life would be about like this. He arises early, feeds the chickens, takes breakfast with his wife, gets into a car of a fellow laborer, stops by to pay his dues at the office of the laborers' union on his way to work. Arriving there he works as a handy man on a dredging job, partly on the dredge and partly on the bank of the channel being built as the dredge works ahead. He shifts discharge pipe and sets stakes on shore, cleans mud from treads of tractors, cleans the dredge, brings

coffee to the operator, carries tools, and runs errands to bring supplies to the job site. His boss is a Superintendent whose office is on land. Petitioner works a 40-hour week of five days at \$2.00 per hour, plus overtime for any hours over 8 in a day or 40 in a week.

Petitioner Had Neither the Duties Nor the Risks of Seamen.

Is this the hardy life of the sea where iron men crew wooden ships? Where is the hazard of the tempest, of the coral reef and rock bound leeward shore? Where is the risk of collision in a fog, unless perhaps the smoke of pipe tobacco around the old base burner counts as such? It has been fairly said that being exposed to the same hazards anciently recognized as those of the sea may be an element to be considered. But there are no seaman's hazards here, nor any injury afloat, nor any captain, mate or boatswain to say go forward or go aft. The record is devoid of all those things which are the essence of life aboard ship: no boatswain, no forecandle, no captain, no log, no galley, no anchor, no watches to stand, no navigation, no master, no mate, no ship's company. Can we find a seaman in this nautical vacuum? Or even more difficult, a "member of the crew"?

The status of the Petitioner of course meant nothing to the jury, which made an award to a worker who sustained an injury from which he soon recovered. A jury of mid-west citizens could bring to bear no common experience of their lives to determine what is or is not a seamen or member of a crew on navigable water under the Jones Act, even if they had actually considered it.* We have here

* "The truth is (as anyone can discover by questioning the average man who has served as a juror) that usually the jury are neither able to, nor do they attempt to, apply the instructions of the Court. The jury are more brutally direct. They determine that they want Jones to collect \$5,000.00 from the railroad company or that they don't want Nellie Brown to go to jail for killing her

a general verdict in favor of a worker who was covered by the State Workmen's Compensation Law, obtained a compensation award and who did not consider himself to be a seaman. That he is not a seaman is obvious to anyone who understands the meaning of that term under custom, usage or legal interpretation.

No Nautical Skills.

Let us consider the skills required of a seaman. They embrace navigation rules, knowledge of vessel lights, steering, standing of watches, serving as lookout, operation of winches, docking and undocking, manipulation of hatch covers, securing of gear for weather, handling of tows, and a myriad of other duties of which Petitioner never heard. It ordinarily involves living on board a vessel and moving about in navigation. It involves membership in seamen's unions and usually a license of some kind from the Coast Guard. Some seamanship may be read from books and perfected aboard ship, but even a casual look into the table of contents (or better still into the text) of "The American Merchant Seaman's Manual", Knight's "Modern Seamanship" or Riesenberg's "Seamanship for the Merchant Service" is convincing that no skills taught therein are of the slightest use to the performance of the Petitioner's work. Those books teach men to be seamen.

Petitioner Was Not a Member of a Crew.

As decided by the Appellate Court in this case, it is apparent that by any ordinary test, Petitioner is not a seaman. But in order to recover under the Jones Act he must be even more than that, he must be "a member of a crew"; one of that class of marine workers excluded

husband, and they bring in their general verdict accordingly. Ordinarily, to all practical intents and purposes, the Judge's views of the law might never have been expressed."

• "Law and The Modern Mind," by Jerome Frank (1930), p. 172.

from the Longshoremen's Act, 33 U. S. C. A., Sec. 901 et seq. There is no doubt that Petitioner's work was local in character and the injury having occurred on land, he was not excluded from the benefits of the State Workmen's Compensation Law. In fact, Petitioner stipulated he was subject to that law. The Longshoremen's act was designed to provide compensation for such workers as Petitioner when their injuries occur on navigable water if they cannot recover state compensation. The effect of the Longshoremen's Act was to confine the benefits of the Jones Act to members of the crew of vessels plying navigable waters. **South Chicago Coal & Dock Co. v. Bassett**, 309 U. S. 251, 60 S. Ct. 544, 84 L. ed. 732; **Swanson v. Marra Bros.**, 328 U. S. 1, 66 S. Ct. 869, 90 L. ed. 1045. These and a host of other cases hold that a member of a crew of a vessel is one who is aboard for the primary purpose of aiding in its navigation. **Seneca Washed Gravel Corporation v. McManigal**, 2 Cir., 65 F. 2d 779; **Bound Brook**, D. C. Mass., 146 F. 160; **Anderson v. Olympian Dredging Co.**, D. C. Calif., 57 F. Supp. 827; and **Wilkes v. Mississippi River Sand & Gravel Company**, 6 Cir., 202 F. 2d 383 (cert. den. 346 U. S. 817, 98 L. ed. 344, 74 S. Ct. 28), are examples.*

* In *Wilkes v. Mississippi River Sand & Gravel Company*, the court in defining a "member of the crew" said, p. 388:

"It would seem that the several tests under the Jones Act should be derived from the cases of *South Chicago v. Bassett*, supra; *Maryland Casualty Co. v. Larson*, 5 Cir., 94 F. 2d 190; *A. L. Mechling Barge Line v. Bassett*, 7 Cir., 119 F. 2d 995; *Carumbo v. Cape Cod S. S. Co.*, supra; and as set forth in *Rackus v. Moore-McCormack Lines, Inc.*, D. C., 85 F. Supp. 185, namely, (1) that the vessel be in navigation; (2) that there be more or less permanent connection with the vessel; and (3) that the worker be aboard primarily to aid in navigation." (Emphasis supplied.)

The Court in *Bound Brook* defined "crew", p. 164:

"When the 'crew' of a vessel is referred to those persons are naturally and primarily meant who are on board her aiding in her navigation." * * *

The Work Site Did Not Navigate.

Petitioner was not on board the dredge "primarily to aid in its navigation." It had no means of propulsion. It did not navigate. It moved earth through a pipe line securely attached to shore, and was fastened with spuds while it dug. It was never engaged in plying in navigable waters. In **Desper v. Starved Rock Ferry Company** (C. A. 7th), 188 F. 2d 177 (aff'd 342 U. S. 187, 96 L. Ed. 205, 72 S. Ct. 216), after referring to the opinion in **Swanson v. Marra Brothers**, 328 U. S. 1, 90 L. Ed. 1045, 66 S. Ct. 869, the Court said, p. 180:

"This decision clearly demonstrates that, since the passage of the Longshoremen's Act, the Court has retreated from the position taken in the **Haverty** case and has narrowed the Jones' Act concept of 'seaman' to the point where it includes only one who is a member of the crew of a vessel plying in navigable waters." (Emphasis supplied.)*

*To the same effect is *Finnie v. Pittsburgh Coal Co.*, 97 F. Supp. 721 (W. D. Pa., 1951), where the Court said, p. 722:

"In the Swanson case, the court held that only members of a crew of a vessel *plying in navigable waters* could avail themselves of the Jones' Act, in view of the provisions of the Longshoremen's and Harbor Workers Compensation Act * * *"
(Emphasis supplied.)

Webster's New International Dictionary, Second Edition, defines "plying," as:

"To go or travel more or less regularly back and forth (between), as, the steamer plies between two cities."

The American College Dictionary contains this definition:

"To traverse (a river) (etc.), esp. on regular trips.

"To drive or run regularly over a fixed course or between certain places, as a boat, a stage (etc.)."

The Dredge Was Not on Navigable Waters.

Gabaret Slough had never been used as a "highway for commerce, over which trade and travel were conducted in the customary modes of trade and travel on water." Absent such use the slough did not constitute navigable water. In **The Daniel Ball**, 10 Wall. (U. S.) 557, 563, 19 L. Ed. 999, 1001, this Court defines navigable water as:

"Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used or are susceptible of being used in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water."

In **Iowa-Wisconsin Bridge Company v. U. S.** (Ct. of Claims), 84 F. Supp. 852 (cert. denied 339 U. S. 982, 94 L. Ed. 1386, 70 S. Ct. 1020), it is stated, p. 866:

"The rule in this country has been, and as far as we can tell, still is, that navigability is a fact which must be proved and the proof must consist of evidence that the watercourse in question is either used or is susceptible of use in its ordinary condition, as a highway of commerce over which trade and travel are or may be conducted in the customary modes of trade and travel on water. **The Daniel Ball**, 10 Wall. 557, 563, 19 L. Ed. 999."

The court added:

"The plaintiff has referred us to numerous cases and we have found others, in which sloughs, admittedly a part of navigable bodies of water, have been held not navigable themselves because they served no useful commercial service to the public." (Emphasis supplied.)

The court concluded the sloughs, although joining the Mississippi River, were not "navigable waters" because, p. 867: "The sloughs have never served any useful commercial purpose."

All of the witnesses who testified to the use of the slough, agreed it had never been used for trade, travel or commerce. Witnesses Sanders (R. 28), Skeen (R. 76) and Stevens (R. 84) each said no river traffic had ever traversed the slough and none had seen any barge, tows, excursion vessels, or, in fact, any vessel larger than a row boat, plying the slough at any time. It was never susceptible of or used as a public highway of transportation and it was not until after its conversion to a navigable canal that it became a navigable water. Petitioner was injured November 3, 1951. The canal was not completed until February 7, 1953 (R. 60). On November 5, 1951, the dredge Wilkinson was not on or plying on navigable waters of the United States. It was, in fact, floating in an artificial basin created in large part by its own work. As said in **Kibadeaux v. Standard Dredging Company** (C. A. 2d), 81 F. 2d 670, 672 (cert. den. 299 U. S. 549, 81 L. Ed. 404, 57 S. Ct. 11):

* To the same effect are *Leary v. United States*, 177 U. S. 621, 44 L. Ed. 914, 20 S. Ct. 797, *North American Dredging Co. of Nevada v. McIntee*, (C. A. 9th), 245 Fed. 297, and *Harrison v. Fair* (C. A. 8th), 148 Fed. 781, 783, where it is stated:

To meet the test of navigability as understood in the American law a watercourse should be susceptible of use for purposes of commerce or possess a capacity for valuable floatage on the transportation to market of the products of the country through which it runs. It should be of practical usefulness to the public as a public highway in its natural state and without the aid of artificial means.

"* * * Mere depth of water, without profitable utility, will not render a watercourse navigable in the legal sense, so as to subject it to the public servitude, nor will the fact that it is sufficient for pleasure boating or to enable hunters or fishermen to float their skiffs or canoes. To be navigable a watercourse must have a useful capacity as a public highway of transportation." (Emphasis supplied.)

“Indeed, injuries occurring on waters which are to become navigable after the dredge cuts the channel, but which have never been navigated before, could hardly be said to occur on navigable waters at all.”

State Compensation Is Available.

During the past forty years, it has been the desire and intention of the Congress to give to workers whose duties were partly on land and partly on water the rights and remedies under the state compensation laws. These efforts were frustrated by the line of decisions which followed **Southern Pacific Co. v. Jensen**, 244 U.S. 205, 37 S. Ct. 524, as is clearly explained in **Davis v. Department of Labor**, 317 U. S. 249, 63 S. Ct. 225 (1942) at page 227. The same Congressional intent was manifested in the enactment of the Federal Longshoremen's and Harbor Workers Act, 33 U. S. 901 et seq., which is applicable only if compensation cannot be validly provided by state law. The dilemma of LaCrosse Dredging Company in defending itself through the courts is much like the dilemma of the employers referred to in the Davis case, LaCrosse having provided the required insurance under the compensation law of Illinois, but after an award was made and compensation paid, there was a complete change of position expressed in this effort to bring Petitioner within the letter of the Jones Act.

The Gianfala Case.

It was not without some moments of concern that we read the per curiam decision in **Gianfala v. Texas Company**, 76 S. Ct. 141. A longer look at the matter, together with a review of the cases cited in the opinion shows that it involved a situation quite different in fact and in law from the case at bar. The accident in the Gianfala case and in all of the cases cited therein occurred on vessels

in navigable waters, not on land as in the case at bar, the craft involved moved from place to place, and there were other factors giving rise to a disputed question as to the nature of the employment. Also, no brief was filed by respondent in opposition to the petition for certiorari. The decision in that case would not be authority for the proposition that if a stockbroker, pawnbroker or lawyer (or the most non-nautical person that can be conjured up) should be an employee of a vessel owner and be injured aboard ship, this Court would be bound by a jury's general verdict for him in a Jones Act case. Just because Gianfala was held to be a seaman is no authority for the proposition that Mr. Senko, the Petitioner, is such. No reasonable legal minds can differ in this Senko case; he is not a seaman. Petitioner's argument that to affirm the Appellate Court would deny the benefits of the Jones Act to all workers in dredge operations simply is not so. There are all manner of dredges and types of dredging work. There are dredges crewed like merchant ships. But such is not our case. Here we have a question somewhat analogous to the old "interstate" versus "intrastate" question under the F. E. L. A.

**Under F. E. L. A. the Court and Not the Jury Decides
Whether or Not the Work Is Interstate.**

The first Federal Employer's Liability Act, enacted in 1906, was unconstitutional because it extended to employees engaged in intrastate commerce, whereas the power of Congress was limited to employment of an interstate nature. **Howard v. Illinois Central Railroad Co.**, 207 U. S. 463, 28 S. Ct. 141, 52 L. ed. 297. A new law was enacted in 1908, and as amended (45 U. S. C. A. 51, etc.) provides a cause of action and a remedy for employees of a carrier whose duties closely affect interstate commerce. Prior to the 1939 Amendment there was a long line of decisions recognizing that Congress intended to confine

the right and remedy to employees engaged in interstate commerce, e. g., **Illinois Central Railroad Co. v. Behrens**, 233 U. S. 473, 34 S. Ct. 646, 58 L. ed. 1051; and that the Act applied only when the carrier and the employee are both engaged in such commerce. **In re Second Employer's Liability Act Cases**, 223 U. S. 1, 32 S. Ct. 169, 56 L. ed. 327. Courts are constantly called upon to decide the scope of the Statute, whether each particular case is within or without the sometimes hazy line dividing interstate from intrastate commerce.

This Court and all courts have held uniformly through the long history of this branch of litigation that the ultimate determination of the laws applicability depending upon whether the man is engaged in interstate commerce is not decided by a jury, but by the Court. The cases on this subject are legion.*

The Court and not the jury determines the applicability of the law, despite the recognized fact that the right of jury trial is one of the substantial benefits afforded to an employee under the Act as compared to the rights of an employee covered by the Workmen's Compensation laws. And it is also clear that where the evidence establishes the interstate character of the shipment, neither a special

**New York C. R. Co. v. White*, 243 U. S. 188, 37 S. Ct. 247 (1916);

Raymond v. Chicago, M. & S. & P. R. Co., 243 U. S. 43, 37 S. Ct. 268 (1917);

Illinois Central Railroad Co. v. Behrens, 233 U. S. 473, 34 S. Ct. 646;

Chicago & N. W. Ry. Co. v. Bolle, 284 U. S. 74, 52 S. Ct. 59, (1931);

Industrial Acc. Comm. of Calif. v. Payne, 259 U. S. 182, 42 S. Ct. 489 (1922);

Chicago & E. I. R. Co. v. Ind. Comm. of Illinois, 284 U. S. 296, 52 S. Ct. 151 (1932);

New York N. H. & H. R. Co. v. Bezuc, 284 U. S. 415, 52 S. Ct. 205 (1932);

Southern Pacific Company v. Gilco, 76 S. Ct. 952 (June, 1956);

Reed v. Pennsylvania Railroad Co., 76 S. Ct. 958, 962 (1956).

finding nor general verdict will preclude this Court from so holding. See **Baltimore & O. S. W. R. Co. v. Burtch**, 263 U. S. 540, 44 S. Ct. 165 (166) (1923). As stated in **Southern Pacific Company v. Gileo**, 76 S. Ct. 952, at 962:

“We hold that the petitioner, by the performance of her duties is furthering interstate transportation . . .”

“Seaman” or “Non-seaman” Status Is Determined by the Court. The Jury Finds the Facts Not the Conclusions.

The Jones Act (46 U. S. C. A. 688) provides that all statutes of the United States modifying or extending the common law right or remedy in cases of injury or death of railway employees shall apply to seamen, and thus adapts F. E. L. A. to seamen. In **Desper v. Starved Rock Ferry Co.**, 342 U. S. 187, 72 S. Ct. 216 (1951), this Court said, page 218:

“It is our conclusion that while engaged in such seasonal repair work, Desper was not a ‘seaman’ within the purview of the Jones Act. The distinct nature of the work is emphasized by the fact that there was no vessel engaged in navigation at the time of decedent’s death. All had been ‘laid up for the winter.’”

That decision is strictly in line with the decisions of this and all other courts in the railway cases that the applicability of the law, whether on account of interstate commerce (or status of the worker as a seaman or otherwise) is to be determined by the Court. Desper had been killed while working on a barge in navigable water. A jury returned a general verdict in favor of his administratrix, on which judgment was entered. The Court of Appeals held that a verdict should have been directed for the defendant and therefore reversed. This ruling was affirmed here.

A Jury Finding as to Negligence Is Different From Determining Applicability of the Jones Act.

Petitioner argues that there is a general unanimity of decision in allowing a jury's verdict to stand "except when there is a complete absence of probative facts to support the conclusion reached." The cases which Petitioner cites (**Lavender v. Kurn**, 327 U. S. 645, and **Tennant v. Peoria & Pekin Union Ry. Co.**, 321 U. S. 29, and **Harsh v. Illinois Term.**, 348 U. S. 940) involved a jury question as to defendant's negligence, and stand only for the well known proposition that where there is evidence of defendant's negligence, the question is for the jury. We do not quarrel at all with that proposition, but it has no application whatever to the issue before this Court, which is **what law should apply**, what status in law does the Petitioner occupy. There is no question of fact for a jury here; certainly no question on which reasonable minds could possibly differ. Even on questions of negligence, it has been long and firmly established in the law that a Court may direct a verdict where the evidence is undisputed or is so conclusive that the Court in the exercise of sound discretion would be compelled to set aside a verdict in opposition to it. **Southern Pacific Co. v. Pool**, 160 U. S. 438, 16 S. Ct. 338. And, of course, a court may direct a verdict for insufficiency of evidence **Galloway v. United States**, 319 U. S. 372, 63 S. Ct. 1077, particularly where as in the case at bar there is no room whatever for an honest difference of opinion as to the facts of Petitioner's status.

Petitioner Should Have His Compensation Award.

Neither the quality of mercy nor of generosity will be strained if this Court affirm the Appellate Court of Illinois. Petitioner will then receive his award under the Workmen's Compensation Law in a proceeding where he stipulated that the local law applied. He was there pro-

vided for regardless of negligence, furthering the humanitarian policy of the Compensation Acts. An attorney's afterthought was that perhaps Mr. Senko can be a seaman in the eyes of the jury. Thus arose this Jarndyce length litigation.

Petitioner did not have the hazards nor the life of a seaman. He argues that he did because as he says (Brief, p. 18), a dredge securely fastened to the ground and digging out a slough "is just as much in navigation as a cargo ship crossing the Atlantic." On this inaccurate premise he now asks this Court to remove him from the laborer status which he had to a seaman's status which he had not.

There was nothing maritime about Petitioner or his work. He was a land laborer who had non-navigation duties to perform both on and off a stationary dredge securely attached to the bottom of a non-navigable slough and who, while performing duties on land, was injured as he contends, because of Respondent's claimed negligence in operating a stove in a building on land.

This suit should never have been brought. This Court can and should decide this question of status, just as it decides pro or con the commerce question, now that certiorari has been granted. **Reed v. Pennsylvania R. Co.**, 76 S. Ct. 958.

CONCLUSION.

The law and the undisputed evidence made it necessary and proper for the Appellate Court to enter judgment for Respondent. It had no alternative. Its judgment was and is correct. It might have reversed the judgment for other reasons which Respondent urged and which it did not consider or decide because it concluded, as it was required to do, that Petitioner was not a seaman.

The judgment of the Appellate Court was and is correct
and this Court should affirm it.

Respectfully submitted,

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1956.

No. 62

JACOB SENKO,

Petitioner,

vs.

LA CROSSE DREDGING CORPORATION,

Respondent.

ON WRIT OF CERTIORARI TO THE APPELLATE COURT OF THE
STATE OF ILLINOIS, FOURTH DISTRICT.

PETITION FOR REHEARING.

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ON WRIT OF CERTIORARI TO THE APPELLATE COURT OF THE
STATE OF ILLINOIS, FOURTH DISTRICT.

PETITION FOR REHEARING.

Respondent prays that this Court grant rehearing of its majority opinion and order of February 25, 1957, which reversed the decision of the Fourth District Appellate Court of the State of Illinois. Despite the sound reasons which lie behind Rule 33, designed to restrict the scope of petitions of this kind, we feel constrained to file this Petition for Rehearing, for the following reasons:

REASONS FOR GRANTING REHEARING.

We respectfully submit that the effect of the majority opinion, if allowed to stand, would be to bring about confusion, fruitless and endless litigation and hardship among workers normally covered by compensation laws, and concurrent damage to their employers.

If this were just a matter of Jacob Senko's recovering \$20,000, less legal expense, perhaps we should not presume upon this Court to reconsider. But thousands of other Jacob Senkos who work in labor gangs, on irrigation systems, conservation projects, levee jobs, dam construction and other earth-removing work will seek to abandon the lesser but surer compensation rights and, urged on by personal injury specialists, will make their pitch for recovery as seamen. Many workers, failing in proof of negligence or in proving jurisdiction, or involved in lengthy appeals in this highly questionable sphere of legal activities, will suffer hardship and loss of compensation, and at the same time will damage industry generally with a new flood of personal injury litigation. At best, the employee and employer will become involved in multiple proceedings, to the economic disadvantage of both industry and labor.

The grave public consequence of reversing the Appellate Court, we believe, was overlooked in the preparation of the majority opinion. If it were right, then, of course, the chips should fall where they will, but the majority opinion is built upon a series of suppositions, speculations and inferences that are directly contrary to the record in this case. There are substantial grounds not previously presented.

The majority opinion likens the dredge to a transoceanic liner, a member of whose crew would be subject to the Jones Act even though the vessel was never in transit during his employment aboard. So it is said that the connection of the dredge with the shore cannot be controlling. But *the record* shows that the dredge does not navigate, it *never* navigates, it never carries any personnel of its own if it is shifted to a new job; it would be towed by a towboat and the *towboat's crew* would be the crew which attends to its safety and its movement until it reaches a new job site.

The *majority opinion* states that "a normal inference" is that petitioner was responsible for seaworthiness of the dredge and that if the dredge leaked the jury "could suppose" that petitioner's job would be to repair the leak. The opinion says there is sufficient evidence in the record for the jury to decide that petitioner was "permanently attached" to the dredge as a member of its crew. That is directly contrary to *the record*, which shows that petitioner, as a member of the Laborers Union, could not be employed beyond the jurisdiction of his local. He had never worked on any vessel in all of his life; he had no knowledge or training to attend to seaworthiness of a vessel or of this dredge. As already mentioned, the laborers on a dredge job, such as petitioner, do not travel with this kind of a dredge if it is moved to a new site, so there is no permanent connection of the labor gang with the dredge. At a new site new labor would be employed from the local of the union having jurisdiction. The majority opinion by *supposition* confers a seaman's status on petitioner which *every fact in evidence* shows he did not have and which petitioner surely did not suspect he had, because he "didn't know what it was in the first place." (R. 168.) He made a stipulation, still unrevoked, that he was subject to the Illinois Workmen's Compensation Law for the purpose of receiving compensation.

The *majority opinion* states as one of the principal reasons for reversal was that petitioner "would have a significant navigational function when the dredge was put in transit." As we have pointed out, this man would not be aboard in any transit, never was aboard in transit, and the soundings were not for navigation but to determine how much soil had been dug. When Jacob Senko was asked about dredge movement, he said, "I don't know how they moved it." (R. 115.)

The opinion says further, "A normal inference is that petitioner was responsible for its [dredge] seaworthiness." Petitioner spent his life working as a coal miner and construction laborer. He had absolutely no experience with vessels and no training or experience in navigation. He was never on the Dredge "WILKINSON" or any boat or dredge when it was in motion. His travel on water was confined to moving 10 to 15 feet in a rowboat. (R. 116.) He knew nothing about the sea or when a vessel was seaworthy. No such "normal inference" as the Court refers to can be drawn from the record. It shows petitioner was a handyman and nothing more. The witness said:

"Well, the deckhand or laborer, or whatever he is, he done the work around there and everything done on the shore he went and did it. (R. 17.)

"Jake [Senko] would take the lanterns, go to the shore, go to the shore and get supplies. If they wanted something on the bank, some shovels or hammers or bars, whatever they needed, that's what Jake would do. (R. 17.)

"Jake brought the water over. somebody wanted shovels on the bank, he would take the shovels over there." (R. 31.)

An inference that Senko was responsible for the vessel's seaworthiness could not be drawn from such testimony.

Although the opinion states (p. 3) that a witness testified "that a usual duty of one holding petitioner's job was to take soundings and clean navigation lights when the dredge was in transit," no such evidence appears in the record. The dredge was towed up the Mississippi River from Chester, Illinois, to the jobsite at Granite City, Illinois, by a commercial vessel. (R. 140.) This commercial vessel was manned by seamen, who signed on, lived aboard, took navigation soundings and performed seamen's duties, which may have included floating navigation lights. (R. 140, 141.)

Neither Senko nor any other laborer was on the dredge when it was so moved. Senko did not go on the jobsite on the dredge. He came on a labor permit from the Laborers Hall at Granite City, as did all the other laborers. If any laborers worked on the dredge at Chester, Illinois, they did not accompany it to Granite City. Senko was never on the dredge when it was moved. (R. 115.) The dredge had no navigation lights. (R. 150.) The only "soundings" Senko ever took were for the sole purpose of ascertaining how deep the dredge cut. (R. 114.)

The majority opinion says (p. 3), that

"the jury could reasonably have believed 'Senko would clean navigation lights and take soundings' when this dredge was moved."

He had never done so. Every *fact* in evidence proves the contrary. The only conclusion the *record* permits is that when the dredge was towed to a new jobsite it would have no laborers or anyone else on board, the towing would be done, as it had been before, by a commercial vessel manned by seamen, and once the new jobsite was reached laborers would be recruited, as was Senko, from the nearest Laborers Hall.

The majority opinion reasons that the jury could have supposed Senko, at some future time, would have had navigational duties for respondent—(a) that he would have been on board when the dredge was in transit, and (b) if on board, would have taken soundings and performed other duties of navigation, and (c) consequently, he had a permanent connection with the dredge. Having thus assumed a seaman's status for Senko on a supposition of speculative duties which Senko might perform at a future time, the opinion concludes petitioner was a seaman when injured because he could not then lose a seaman's status which he might some day acquire, for the

reason the dredge was "at anchorage" when he was injured.

As the opinion states, the "Court does not normally sit to reexamine a finding of the type that was made below", but we urgently submit that having undertaken such re-examination, it should follow the facts of record and not the speculative supposition of a jury made in patent disregard thereof.

Another important reason why rehearing is required is to determine whether for purposes of the Jones Act a structure such as this dredge is a vessel. The court decisions are far reaching and inclusive as to what is a vessel, even down to small craft, so long as they provide "a means of transportation". That element is lacking with respect to this dredge. The federal statutory definition of a vessel in 1 U. S. C. A. 3 is:

"§ 3. 'Vessel' as including all means of water transportation. The word 'vessel' includes every description of water craft or other artificial contrivance used, or capable of being used, as a means of transportation on water." (R. S. § 3.)

As mentioned in a footnote to the majority opinion, no question was raised as to whether the dredge had the status of a vessel. That question should be considered and fully presented by brief and argument. Under the Jones Act, in order to be a "seaman" one must have duties pertaining to a vessel which can navigate. For the purpose of that Act, a dredge should not be a vessel, even though it might be such under other laws or for other purposes.

As has been pointed out more fully in the dissenting opinion of Mr. Justice Harlan, the petitioner met none of the requirements of having some connection with a ship's company; he was subject to the discipline and super-

vision not of officers of a vessel but of the labor foreman in charge of the construction project who worked on shore. His connection was not with a vessel but with a construction gang.

The majority opinion overlooks the fact that positive evidence as to the nature of seamen's duties on the western rivers was received and that the petitioner failed to meet the test on any conceivable basis. The jury returned a general verdict for the plaintiff, but this is not binding as to his status because no reasonable minds could differ as to his non-maritime status, which did not meet the requirements of the Jones Act. The evidence was insufficient to support the finding of the jury.

The social conscience has grown considerably in the past 40 years, and one of the most significant achievements of the State legislatures is found in the compensation acts. It has also been the desire of Congress to provide so far as possible compensation, regardless of negligence, for industrial accidents. Today, with good compensation laws, there is no need to stretch the other legislation to provide for workers such as petitioner. Even when it is stretched, it is not a real boon, as the men are faced with the need of proving negligence and will be confronted with the defense in many cases that compensation acts are not applicable. The employee would be in the dilemma of choosing from three possible routes, the employer the cost of defending three proceedings.

The majority opinion compounds the unfortunate legal fiascos which came from *Southern Pacific v. Jensen*, 244 U. S. 205, 37 S. Ct. 524; it adds one more large area of confusion to the already confused situation of amphibious workers, cf., *Davis v. Department of Labor*, 317 U. S. 249, 63 S. Ct. 255. This latest element of confusion should be corrected upon rehearing.

In order that we may do our part in helping to clarify the law, we pray that this Court grant a rehearing.

Respectfully submitted,

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CERTIFICATE OF COUNSEL.

I hereby certify that the foregoing Petition for Rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 33 of the rules of this Court.

.....
STUART B. BRADLEY.

PROOF OF SERVICE.

I, **STUART B. BRADLEY**, one of the attorneys for **LaCrosse Dredging Corporation**, respondent herein, and a member of the bar of the Supreme Court of the United States, hereby certify that on the 20th day of **March**, 1957, I served copies of the foregoing Petition for Rehearing on **Jacob Senko**, Petitioner herein, by mailing copies in duly addressed envelopes, with first class postage prepaid, to his respective attorneys of record, as follows:

Stanley M. Rosenblum, Esq.,
405 Olive Street,
St. Louis 2, Missouri; and

Messrs. George J. Moran and William J. Beatty,
1930 State Street,
Granite City, Illinois.

.....
STUART B. BRADLEY.

Subscribed and sworn to before me this 20th day of
March, 1957.

.....
Notary Public.